No. 80-901

FILED
DEC 4 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

RAY MARSHALL, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
APPELLANT

v.

DOUGLAS DEWEY AND
WAUKESHA LIME AND STONE COMPANY

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether Section 103(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. (Supp. II) 813(a), violates the Fourth Amendment insofar as it authorizes representatives of the Secretary of Labor to conduct warrantless safety and health inspections of stone quarries.

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OPINIONS BELOW

The main opinion of the district court (App. A, *infra*, 1a–6a), as amended sua sponte (App. C, *infra*, 8a, 10a), is reported at 493 F. Supp. 963. The opinion of the district court denying a motion by the Secretary of Labor to alter or amend the judgment (App. D, *infra*, 11a–12a) is not reported. The opinions of the district court at the preliminary injunction stage (App. E, *infra*, 13a–16a; App. F, *infra*, 17a–19a) are also not reported.

JURISDICTION

The judgment of the district court was entered on July 15, 1980 (App. B, *infra*, 7a), and was amended sua sponte on July 22, 1980 (App. C, *infra*, 9a). The district court denied the Secretary of Labor's motion to alter or amend the judgment on August 11, 1980 (App. D, *infra*, 11a–12a). The Secretary filed a notice of appeal to this Court on September 9, 1980 (App. G, *infra*, 20a). On October 30, 1980, Justice Stevens extended the time in which to docket the appeal to and including December 8, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1252. *Williams* v. *Zbaraz*, No. 79–4 (June 30, 1980).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. a. Section 103(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. (Supp. II) 813(a), provides:

> Authorized representatives of the Secretary [of Labor] or the Secretary of Health, Education, and Welfare shall make frequent inspections and investiga-

tions in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this subchapter or other requirements of this chapter. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection the Secretary of Health, Education, and Welfare may give advance notice of inspections. In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary [of Labor] shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year. The Secretary [of Labor] shall develop guidelines for additional inspections of mines based on criteria including but not limited to, the hazards found in mines subject to this chapter, and his experience under this chapter and other health and safety laws. For the purpose of making any inspection or investigation under this chapter, the Secretary [of Labor], or the Secretary of Health, Education, and Welfare, with respect to fulfilling his responsibilities under this chapter, or any authorized representative of the Secretary [of Labor] or the Secretary of Health, Education, and Welfare, shall have a right of entry to, upon, or through any coal or other mine.

b. Section 108(a)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. (Supp. II) 818(a)(1), provides:

> The Secretary [of Labor] may institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate

order in the district court of the United States for the district in which a coal or other mine is located or in which the operator of such mine has his principal office, whenever such operator or his agent—

> (A) violates or fails or refuses to comply with any order or decision issued under this chapter,
>
> (B) interferes with, hinders, or delays the Secretary [of Labor] or his authorized representative, or the Secretary of Health, Education, and Welfare or his authorized representative, in carrying out the provisions of this chapter,
>
> (C) refuses to admit such representatives to the coal or other mine,
>
> (D) refuses to permit the inspection of the coal or other mine, or the investigation of an accident or occupational disease occuring in, or connected with, such mine,
>
> (E) refuses to furnish any information or report requested by the Secretary [of Labor] or the Secretary of Health, Education, and Welfare in furtherance of the provisions of this chapter, or
>
> (F) refuses to permit access to, and copying of, such records as the Secretary [of Labor] or the Secretary of Health, Education, and Welfare determines necessary in carrying out the provisions of this chapter.

STATEMENT

On July 10, 1978, Walter Brey, an authorized representative of the Secretary of Labor, attempted to inspect the quarry and mill operated by appellee Waukesha Lime and Stone Company in Waukesha, Wisconsin (App. E, *infra*, 13a).[1] The inspection was attempted pursuant to Section

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[1] Waukesha's operation covers 300 acres and employs 30 full-time workers. The work in the quarry is above ground and involves the use of explosives to dislodge pieces of rock from the quarry wall. The rock is then transported by loaders to a crushing facility where it is reduced to different grades of limestone. Deposition of Douglas Dewey, at 6–10, 21 (Aug. 8, 1979).

103(a) of the Federal Mine Safety and Health Act of 1977 (Mine Safety Act), 30 U.S.C. (Supp. II) 813(a). The purpose of the inspection was to determine whether Waukesha had corrected a violation discovered by Brey during an earlier inspection under the Act (App. E, *infra*, 13a).[2] Waukesha's president, Douglas E. Dewey, refused to permit Brey to inspect the facility without a search warrant. Brey thereupon issued a citation to Waukesha for denial of entry, pursuant to Section 104(a) of the Mine Safety Act, 30 U.S.C. (Supp. II) 814(a).[3]

On February 23, 1979, the Secretary filed this civil action against appellees Dewey and Waukesha in the United States District Court for the Eastern District of Wisconsin, pursuant to Section 108(a)(1) of the Mine Safety Act, 30 U.S.C. (Supp. II) 818(a)(1). The Secretary's complaint sought injunctive relief barring appellees from refusing to permit warrantless inspections of the Waukesha quarry

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[2] Following an inspection of Waukesha's facility in April 1978, Brey issued 25 citations for violations of mandatory health and safety standards (App. E, *infra*, 13a). The July 10 inspection was specifically designed to ascertain whether Waukesha had sufficiently reduced the exposure of one of its employees to silica-bearing dust (*ibid.*). An earlier inspection, conducted in September 1975 after the work-related death of one of Waukesha's employees, had resulted in the issuance of two notices of safety violations (*ibid.*).

[3] The Mine Safety Act provides that the Secretary shall issue citations and propose civil penalties for violations of the Act or of any mandatory health and safety standard promulgated under the Act. 30 U.S.C. (Supp. II) 814(a), 820(a). When an operator contests a citation, the Act provides for a hearing before an administrative law judge, whose decision is subject to discretionary review by the Federal Mine Safety and Health Review Commission. 30 U.S.C. (Supp. II) 815(d), 823(d). The operator is entitled to review of the final administrative decision as of right in the court of appeals. 30 U.S.C. (Supp. II) 816.

In this case, the Secretary's proposed civil penalty of $1,000 was upheld by an administrative law judge. Waukesha's petition for review of the administrative law judge's decision was granted, and its challenge to the validity of the proposed penalty is currently under submission to the Federal Mine Safety and Health Review Commission. *Waukesha Lime and Stone Co., Inc.* v. *Secretary of Labor*, FMSHRC Docket No. VINC 79-66-PM.

and mill under the Mine Safety Act. In their response to the complaint, appellees sought an injunction requiring the Secretary to obtain a search warrant prior to inspecting Waukesha's facilities.

The district court denied the Secretary's motion for summary judgment and granted summary judgment in favor of appellees, holding that Section 103(a) of the Mine Safety Act, 30 U.S.C. (Supp. II) 813(a), is unconstitutional insofar as it authorizes warrantless inspections of stone quarries (Apps. A–C, *infra*, 1a–10a).[4] The district court observed that this Court has permitted warrantless searches of commercial establishments in certain regulated industries (App. A, *infra*, 1a, citing *United States* v. *Biswell*, 406 U.S. 311 (1972) (firearms); *Colonnade Catering Corp.* v. *United States*, 397 U.S. 73 (1970) (liquor)), and that several courts of appeals have specifically upheld the constitutionality of warrantless inspections of stone quarries and sand pits pursuant to the Mine Safety Act (App. A, *infra*, 2a–4a). Nevertheless, relying on language in *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978), the district court concluded that warrantless administrative searches are not constitutionally permissible except in industries that have had a long tradition of governmental regulation (App. A, *infra*, 2a). Because stone quarries were not subjected to extensive federal regulation until 1966, the court ruled that such quarries have not had a sufficiently lengthy regulatory history to allow warrantless inspections under the *Biswell-Colonnade* exception to the Fourth Amendment's warrant requirement (*id.* at 5a–6a).

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[4] In its initial opinion, the district court cited Section 108 of the Mine Safety Act, 30 U.S.C. (Supp. II) 818, which authorizes the Secretary to seek injunctions to enforce the Act, as the provision it found unconstitutional (App. A, *infra*, 6a). The court thereafter amended its opinion and judgment to reflect the fact that its decision was limited to holding unconstitutional only Section 103(a) of the Act, 30 U.S.C. (Supp. II) 813(a), the warrantless inspection provision (App. B, *infra*, 8a–10a; see also App. C, *infra*, 11a–12a).

The district court had previously denied the Secretary's and appellees' motions for a preliminary injunction (Apps. E and F, *infra*, 13a–19a).

THE QUESTION IS SUBSTANTIAL

The district court has held that Section 103(a) of the Mine Safety Act is unconstitutional insofar as it authorizes warrantless inspections of stone quarries. The decision below, if permitted to stand, will seriously impair effective implementation of federal legislation designed to protect the health and safety of workers in an industry that Congress has found to be among the most hazardous in the nation. The decision is inconsistent with this Court's rationale in *United States* v. *Biswell*, 406 U.S. 311 (1972), and *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970), and is in direct conflict with the holdings of three courts of appeals that have sustained the constitutionality of the warrantless inspection provision of the Act in similiar factual contexts. *Marshall* v. *Texoline Co.*, 612 F.2d 935 (5th Cir. 1980) (gravel pit); *Marshall* v. *Nolichuckey Sand Co., Inc.*, 606 F.2d 693 (6th Cir. 1979), cert. denied, No. 79-1204 (Apr. 21, 1980) (sand and gravel pit); *Marshall* v. *Stoudt's Ferry Preparation Co.*, 602 F.2d 589 (3d Cir. 1979), cert. denied, 444 U.S. 1015 (1980) (processing plant separating sand and gravel from coal-like substance). Accordingly, review by this Court is warranted.

1. In *Colonnade Catering Corp.* v. *United States*, *supra*, this Court considered the statutory authorization for warrantless inspections of federally licensed dealers in alcoholic beverages. After reviewing the history of federal regulation in the area of alcoholic beverages, the Court concluded that Congress had long exercised control over the liquor industry and "has broad power to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand." 397 U.S. at 76. Accordingly, the Court unanimously ruled that the Fourth Amendment did not bar warrantless inspections to enforce the liquor laws. However, the Court held that the particular inspection was beyond the scope of the statute because Congress had not expressly authorized forcible entries without a warrant, but instead had made it an offense for a licensee to refuse admission to an inspector. *Id.* at 77.

Thereafter, in *United States* v. *Biswell*, *supra*, the Court upheld the warrantless search provisions of the Gun Control Act of 1968, 18 U.S.C. 923(g), despite the fact that "[f]ederal regulation of the interstate traffic in firearms is not as deeply rooted in history as is government control of the liquor industry ***." 406 U.S. at 315. The Court noted that regulation of firearms traffic was of "central importance to federal efforts to prevent violent crime" and that inspection was "a crucial part of the regulatory scheme." *Ibid.* In addition, the Court observed that warrantless inspections were reasonable under the Fourth Amendment because they were essential to proper enforcement of the law, and that inspections under the Gun Control Act posed only limited threats to firearms dealers' justifiable expectations of privacy. *Id.* at 316. In light of these considerations, the Court concluded that "where, as here, regulatory inspections further urgent federal interest, and the possibilities of abuse and the threat to privacy are not of impressive dimensions, the inspection may proceed without a warrant where specifically authorized by statute." *Id.* at 317.

Although the district court in this case recognized that warrantless searches of business premises are constitutionally permissible in certain circumstances, it concluded, in reliance on language in *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978), that the administrative search exception to the warrant requirement is applicable only in those industries that have a long tradition of governmental regulation. This conclusion is based on a misreading of this Court's decision in *Barlow's* and is directly contrary to the decision in *Biswell*.

Barlow's involved the constitutionality of warrantless searches under the Occupational Safety and Health Act of 1970. While it is true, as the district court noted (App. A, *infra*, 2a), that the Court in *Barlow's* referred to a "long tradition of close government supervision" (436 U.S. at 313) as one factor distinguishing between enterprises that may be inspected without a warrant and those that may not, this statement was not intended to be exhaustive.

Rather, the Court also expressly reaffirmed the exception to the warrant requirement for statutorily authorized warrantless searches of " 'pervasively regulated business[es],' " typified by *Biswell* (firearms), and explained that "businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade * * *. The businessman in a regulated industry in effect consents to the restrictions placed upon him." *Marshall* v. *Barlow's, Inc.*, *supra*, 436 U.S. at 313, quoting from *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 271 (1973).[5] In view of the fact that *Biswell* upheld warrantless searches in an industry that had not had a lengthy history of governmental regulation and that the decision in *Biswell* was cited approvingly in *Barlow's*, it is clear that the district court erred in concluding that warrantless inspections of stone quarries under the Mine Safety Act could not be sustained merely because quarries have not had a long tradition of federal regulation.

Moreover, although *Barlow's* refused to extend the exception for pervasively regulated businesses to all industries covered by the Occupational Safety and Health Act, the Court emphasized that its decision was limited to OSHA searches and that the reasonableness of warrantless inspections under other regulatory statutes would "depend upon the specific enforcement needs and privacy guarantees of each statute" (436 U.S. at 321). In particular, the Court recognized that "[s]ome * * * statutes * * * apply only to a single industry, where regulations might already be so pervasive that a *Colonnade-Biswell* exception to the warrant requirement could apply" (*id.* at 321). The Court specifically cited the predecessor statutes of the Mine Safety Act as examples of regulatory schemes that were sufficiently distinguishable from OSHA that their constitutional validity would not be placed in question by the holding in *Barlow's* (*id.* at 321–322 n.18).

[5] As the Court similarly observed in *Delaware* v. *Prouse*, 440 U.S. 648, 662 (1979), "[t]here are certain relatively 'unique circumstances' * * * in which consent to regulatory restrictions is presumptively concurrent with participation in the regulated enterprise." See also *United States* v. *Biswell*, *supra*, 406 U.S. at 316.

Three courts of appeals have examined the enforcement needs and privacy guarantees of the Mine Safety Act and have concluded, contrary to the district court in this case, that warrantless searches of stone quarries or similar facilities are not invalid under this Court's decision in *Barlow's*. *Marshall* v. *Texoline Co.*, *supra*; *Marshall* v. *Nolichuckey Sand Co., Inc.*, *supra*; *Marshall* v. *Stoudt's Ferry Preparation Co.*, *supra*. In addition, the Fourth Circuit has upheld the constitutionality of a warrantless inspection under the Act of an owner-operated coal mine. *Marshall* v. *Sink*, 614 F.2d 37 (1980).[6]

These courts of appeals have recognized that there are significant differences between the statutory scheme in *Barlow's* and the statutory scheme involved in the instant case. See *Marshall* v. *Texoline Co.*, *supra*, 612 F.2d at 937; *Marshall* v. *Nolichuckey Sand Co., Inc.*, *supra*, 606 F.2d at 695–696; *Marshall* v. *Stoudt's Ferry Preparation Co.*, *supra*, 602 F.2d at 594. See also *Marshall* v. *Sink*, *supra*, 614 F.2d at 38–39. As these courts have observed, the Mine Safety Act, unlike OSHA, applies to a single industry with an acknowledged history of serious accidents and unhealthful working conditions; the inspection provisions of the Mine Safety Act are more narrowly drawn

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[6]Prior to *Barlow's*, in *Youghiogheny & Ohio Coal Co.* v. *Morton*, 364 F. Supp. 45 (S.D. Ohio 1973), a three-judge court upheld warrantless searches of coal mines pursuant to the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 *et seq*.

We note that the Ninth Circuit recently held, in *Marshall* v. *Wait*, 628 F.2d 1255 (1980), that a small, decorative rock quarry, family owned and operated since the turn of the century, could not constitutionally be subjected to warrantless inspections under the Mine Safety Act. In the special circumstances of that case, the court concluded that the owners had not impliedly consented to warrantless inspections and thus had a reasonable expectation of privacy from warrantless governmental intrusions (*id*. at 1259). The court explicitly declined to rule on the facial constitutionality of the Act's inspection provision (*id*. at 1258).

The question presented in this case is also raised in two appeals that are pending before the Tenth Circuit. *Marshall* v. *Wallach Concrete Products, Inc.*, No. 80–1334; *Marshall* v. *Rose Gravel Co.*, No. 80–1027.

than those of OSHA; and there is less likelihood of the abuses of "unbridled discretion of executive and administrative officers" that the Court in *Barlow's* found objectionable. See *Marshall* v. *Barlow's, Inc.*, *supra*, 436 U.S. at 323.

2. The decisions of these courts of appeals are correct because, as we now demonstrate, the warrantless safety inspection provisions of the Mine Safety Act meet the Fourth Amendment's standard of reasonableness. Here, as in *United States* v. *Biswell*, *supra*, 406 U.S. at 317, warrantless inspections are expressly authorized by statute, "regulatory inspections further urgent federal interest, and the possibilities of abuse and the threat to privacy are not of impressive dimensions."

a. Because of the dangerous working conditions in the nation's mines, the failure of mine operators to correct hazardous conditions, and the substantial damage to society and to interstate commerce resulting from mine-related accidents, the federal government has a valid and overriding interest in the health and safety of the nation's miners. "Large interests are at stake, and inspection is a crucial part of the regulatory scheme" (*United States* v. *Biswell*, *supra*, 406 U.S. at 315), because it helps to insure that miners are not subjected to unduly hazardous conditions.

In subjecting the coal mining industry to pervasive regulation, Congress long ago recognized the particular dangers involved in mining. See *United States* v. *Consolidation Coal Co.*, 560 F.2d 214, 220 (6th Cir. 1977), vacated and remanded, 436 U.S. 942, reaffirmed on remand, 579 F.2d 1011 (1978), cert. denied, 439 U.S. 1069 (1979). The health and safety of miners in other extractive industries first came under federal regulation in 1966, with the passage of the Federal Metal and Nonmetallic Mine Safety Act (Metal Act), 30 U.S.C. 721 *et seq.* In its report on the Metal Act, the Senate Committee cited a report by the Mine Safety Study Board concerning conditions in the metal and non-metallic mining industry. The study board found that, of 270 men killed in mining accidents in an 18-month span, approximately half were classified as the

victims of inadequate supervision or hazardous conditions that were within the power of mine operators to correct, including failure to provide safety devices, defective equipment, roof collapses and inadequate ventilation. S. Rep. No. 1296, 89th Cong., 2d Sess. 2-3 (1966). In rejecting several amendments to exclude sand, gravel and crushed stone operations from coverage under the Metal Act, the Senate Committee observed that the available statistics concerning injury frequency and severity "conclusively show that the sand and gravel industry is the most hazardous except for the underground coal and mineral mining industries." *Id.* at 7.

The Mine Safety Act was enacted in 1977, when Congress combined regulation of all mines under one statute and placed inspection control in the hands of the Secretary of Labor. Pub. L. No. 95-164, 91 Stat. 1290 *et seq.* This enactment repealed the Metal Act and amended the Federal Coal Mine Health and Safety Act of 1969 (Coal Act), 30 U.S.C. 801 *et seq.*, to include mines previously covered under the Metal Act.[7]

The extent of federal regulation under the Mine Safety Act is far-reaching and pervasive. The Secretary of Labor is directed to develop detailed mandatory safety and health standards for all mines for the protection of life and prevention of injuries. 30 U.S.C. (Supp. II) 811. Representatives of the Secretary are empowered and required to inspect all mines frequently in order to obtain and disseminate safety and health information, investigate accidents, and monitor compliance with safety and health standards (30 U.S.C. (Supp. II) 813), to issue and enforce citations for failure to follow safety and health standards (30 U.S.C. (Supp. II) 814), and to order that all miners be

[7]The Mine Safety Act defines "coal or other mine" to include "an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground." 30 U.S.C. (Supp. II) 802(h)(1). Both the Metal Act and the Coal Act contained right to entry inspection provisions virtually identical to Section 103(a) of the Mine Safety Act. See 30 U.S.C. 724; 30 U.S.C. 813(b)(1). Both Acts also had injunctive procedures virtually identical to Section 108(a) of the Mine Safety Act, 30 U.S.C. (Supp. II) 818. See 30 U.S.C. 733(a); 30 U.S.C. 818.

withdrawn immediately from affected areas when imminently dangerous conditions are found to exist (30 U.S.C. (Supp. II) 817).

Congress enacted the Mine Safety Act because of its concern that previous legislation had not provided sufficient protection to miners. The Senate Committee report listed several mining accidents in recent years that had taken the lives of 260 people and noted that:

> [D]espite * * * considerable Congressional attention, our nation still experiences deaths and serious injuries in our mines at a rate which casts shame on an advanced, industrialized society. Every working day of the year, at least one miner is killed and sixty-six miners suffer disabling injuries in our nation's mines.

S. Rep. No. 95-181, 95th Cong., 1st Sess. 4 (1977). In addition, the statement of congressional purpose in the Act reflects Congress' recognition of the urgent need to improve mine working conditions and of the disruptive effects of mining accidents on miners, their families and the nation's commerce. 30 U.S.C. (Supp. II) 801.

Congress specificially found that the rate of injury in the mining industry greatly exceeded the average of all industries regulated under the Occupational Safety and Health Act.[8] Because of the alarming health and safety statistics present throughout the entire mining industry, Congress reasonably concluded that all miners, whether coal, metal, or non-metal, must have access to equal and uniform enforcement of the federal mine safety and health laws. H.R. Rep. No. 95-312, *supra*, at 8; 123 Cong. Rec. 19925 (1977)

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[8]The Senate Committee reported that:

> [F]atalities and disabling injuries in our nation's mines are still unacceptably and unconscionably high. According to the 1974 Annual Report on Occupational Safety and Health, the incidence of work related injuries and illnesses for miners exceeded the "all-industry" rate by about 14 percent. * * * [Moreover], "about one out of every 1500 mine workers * * * was killed on the job or died from work related injuries or illnesses in 1973, compared with one out of every 12,400 for all workers covered by OSHA."

S. Rep. No. 95-181, *supra*, at 7; see also H.R. Rep. No. 95-312, 95th Cong., 1st Sess. 1 (1977).

(remarks of Sen. Williams); *id.* at 20002-20003 (remarks of Sen. Williams); *id.* at 20008 (remarks of Sen. Javits).

b. Warrantless inspections are essential "if the law is to be properly enforced and inspection made effective * * *." *United States* v. *Biswell*, *supra*, 406 U.S. at 316. Congress determined that frequent, unannounced, on-site inspections are necessary in order to enforce compliance with the safety and health standards to be developed by the Secretary of Labor. Under the Mine Safety Act, each underground mine in the nation is to be inspected in its entirety at least four times annually, and all surface or other mines, including stone quarries, are to be inspected at least twice annually. 30 U.S.C. (Supp. II) U.S.C. 813 (a).[9]

Congress left no doubt that these inspections are to be accomplished without the use of a warrant. Section 103(a) of the Mine Safety Act absolutely prohibits the giving of advance notice of inspections to determine whether an imminent danger exists or whether the facility is in compliance with the mandatory health and safety standards of the Act. Moreover, Section 103(a) provides that the Secretary's representative "shall have a right of entry to, upon, or through any coal or other mine" for the purpose of conducting an inspection under the Act. The Senate Committee report explicitly stated Congress' intention "to grant a broad right-of-entry to the Secretaries or their authorized representatives to make inspections and investigations of all mines under this Act *without first obtaining a warrant*." S. Rep. No. 95-181, *supra*, at 27 (emphasis added).

Congress has thus instituted an extensive warrantless inspection program to protect against mine hazards and disasters. A warrant requirement would seriously under-

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[9] In addition, for mines that liberate excessive amounts of explosive gases, the Secretary is required to inspect once every five days at irregular intervals. 30 U.S.C. (Supp. II) 813(i). In fiscal year 1979, the latest complete year for which statistics are available, there were 20,061 mines subject to the Mine Safety Act. Of those, 206 are considered gassy and, therefore, are inspected once every five days. In fiscal year 1979, there were 1,978 federal inspection personnel, who performed 114,032 inspections and investigations.

mine the ability of the Secretary to carry out his responsibilities under the Mine Safety Act. If a warrant were required, the Secretary could choose to obtain warrants prior to all inspections. However, this approach would require the Secretary to prepare a warrant application and to submit the application to a magistrate each time he is required by statute to conduct an inspection. As a result, the Secretary, the United States Attorneys (see 30 U.S.C. (Supp. II) 822) and the federal courts would be overburdened, and the purpose of the Mine Safety Act—protection of miners—would be frustrated, by the huge volume of paperwork that would be generated in order to obtain warrants authorizing the more than 100,000 mine inspections that are performed annually (see note 9, *supra*).

On the other hand, if the Secretary initially seeks to inspect with the consent of the mine operator, the operator could simply refuse entry until a warrant is obtained, in order to take cosmetic safety steps before the inspector returns, and could then revert to unsafe practices after the inspector departs. Congress was well aware of this possibility and therefore mandated that all mines be subject to unannounced inspections. The Senate Committee report explained that:

> [I]n view of the notorious ease with which many safety or health hazards may be concealed if advance warning of inspection is obtained, a warrant requirement would seriously undercut this Act's objectives.
>
> The Committee has specifically adopted the prohibition on advance notice of inspections which is currently the rule under the Coal Act, and rejects the provision of the Metal Act which permits such advance notice.

S. Rep. No. 95-181, *supra*, at 27. Hence, either approach—the use of a warrant in every case, or the obtaining of a warrant when an operator refuses to admit an inspector who arrives at an inopportune time—would seriously impede the Act's enforcement program.

c. Warrantless inspections under the Mine Safety Act pose only a minimal threat to any reasonable expectations

of privacy that mine operators may have. The Act has built-in protections to insure that the power of warrantless entry will not be abused, and the occurrence and frequency of inspections are not left entirely to the unfettered discretion of inspectors in the field. See *Marshall* v. *Barlow's, Inc.*, *supra*, 436 U.S. at 323; cf. *Delaware* v. *Prouse*, 440 U.S. 648, 661 (1979).

Congress has mandated that regular inspections be conducted as a critical part of the safety and health standards enforcement mechanism and has specified the minimum number of annual inspections. 30 U.S.C. (Supp. II) 813(a). In addition, operators of mines must be familiar with the safety and health standards of the Mine Safety Act and thus are presumed to have full knowledge of the inspector's task and his authority to inspect. These factors were relied on by this Court in *Biswell* in upholding a warrantless search (406 U.S. at 316), and they also led the court in *Youghiogheny & Ohio Coal Co.* v. *Morton*, 364 F. Supp. 45, 51 (S.D. Ohio 1973) (three-judge court), to hold that warrantless inspections under the Coal Act were reasonable. The inspections conducted under the Mine Safety Act are thus materially different from those disallowed in *Camara* v. *Municipal Court*, 387 U.S. 523 (1967), or *See* v. *City of Seattle*, 387 U.S. 541 (1967). In those cases, the Court found that the occupant of a home or owner of a commercial building had no way of knowing whether enforcement of a municipal code involved inspection of his premises, whether inspectors were authorized to search, or whether the search exceeded the limits of the inspection powers. See *Marshall* v. *Barlow's Inc.*, *supra*, 436 U.S. at 323.

The Mine Safety Act prohibits forcible entries and thus provides a mine operator with an opportunity to obtain immediate judicial review of any special privacy claims it wishes to assert. See *Marshall* v. *Texoline Co.*, *supra*, 612 F.2d at 937-938; *Marshall* v. *Stoudt's Ferry Preparation Co.*, *supra*, 602 F.2d at 594. When a mine operator refuses to allow an inspection, the Secretary is authorized by 30 U.S.C. (Supp. II) 818(a)(1) to file a civil action in federal district court to enjoin future denials of entry, as

was done in the instant case. The district court in issuing the injunction may take steps to accommodate any unusual privacy expectations asserted by the mine operator. In *Marshall* v. *Stoudt's Ferry Preparation Co.*, *supra*, 602 F.2d at 594, for example, the district court imposed on the federal inspectors a confidentiality requirement in order to protect the mine operator's trade secrets.[10]

In contrast to the injunction procedure under the Act, imposition of a warrant requirement would not provide any significant protection to those mine operators who might wish to assert unusual privacy claims. This is so because, in the administrative search context, "probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].' " *Marshall* v. *Barlow's Inc.*, *supra*, 436 U.S. at 320, quoting from *Camara* v. *Municipal Court*, *supra*, 387 U.S. at 538 (footnote omitted). Here, as in *Biswell*, "if the necessary flexibility as to time, scope and frequency is to be preserved, the protections afforded by a warrant would be negligible." 406 U.S. at 316. Hence, adding a warrant requirement would gain the operators little, but would seriously impede enforcement of the Mine Safety Act.

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[10] As we have previously noted, (see note 7, *supra*), 30 U.S.C. (Supp. II) 818(a)(1) had predecessors in both the Coal and Metal Acts. The injunction provisions of these Acts were cited favorably by this Court in *Marshall* v. *Barlow's, Inc.*, *supra*, 436 U.S. at 321 & n.18, as statutes specifically authorizing "resort to federal-court enforcement when entry [for inspection] is refused * * * ."

In light of the overwhelming governmental interest in protecting the lives and health of mine employees, the need for frequent, unannounced inspections of mines, and the minimal threat to the privacy interests of mine operators, we submit that warrantless inspections under the Mine Safety Act are reasonable under the Fourth Amendment.[11]

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[11] The opinion of the district court denying the government's motion to amend the judgment (App. D, *infra*, 11a–12a) clearly indicates that the judgment below is not based on the court's discussion, in its decision granting summary judgment for appellees (App. A, *infra*, 5a), regarding the civil penalty provision of the Mine Safety Act. There is, in any event, nothing in this provision that casts doubt on the validity of the Act. Under the Act, any penalty assessed by the Secretary is reviewable by an administrative law judge, by the Federal Mine Safety and Health Review Commission, and by a federal court of appeals. 30 U.S.C. (Supp. II) 815(d), 823(d)(2)(A), and 816. This scheme affords adequate protection against a wrongly assessed penalty. As noted earlier (see note 3, *supra*), Waukesha's challenge to the penalty assessed in this case is currently pending before the Mine Safety Review Commission.

Furthermore, the district court erred in concluding (App. A, *infra*, 5a) that the imposition of a penalty for frustrating a safety inspection "does not present a fair means for protecting privacy interests." Without such a penalty, mine owners would have no incentive to permit inspections without forcing the Secretary to obtain an injunction when inspecting each mine for the first time. Moreover, assessment of a $1,000 penalty, as in the present case, does not rise to the level of a penalty so "great that non-compliance and a judicial challenge cannot be risked." See *Brown & Williamson Tobacco Corp.* v. *Engman*, 527 F.2d 1115, 1119 (2d Cir. 1975), cert. denied, 426 U.S. 911 (1976).

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General

ELLIOTT SCHULDER
Assistant to the Solicitor General

WILLIAM KANTER
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CARIN ANN CLAUSS
Solicitor of Labor

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CYNTHIA L. ATTWOOD
Attorneys
Department of Labor

DECEMBER 1980

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JULY 10, 1980

Case No. 79-C-114

RAY MARSHALL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF

v.

DOUGLAS DEWEY AND WAUKESHA LIME & STONE CO., WAUKESHA, WISCONSIN, DEFENDANTS.

MEMORANDUM AND ORDER

On March 9, 1979, after having heard oral argument, this Court denied plaintiff's motion for a preliminary injunction in which plaintiff sought to enjoin defendants from refusing to permit an agent of the Secretary of Labor to enter and inspect defendants' stone quarry. A formal memorandum and order denying the motion of the Secretary of Labor was signed on March 29, 1979. In that opinion, this Court found *sub silentio* that warrantless searches of stone quarries as authorized by Congress in the Federal Mine Safety and Health Act of 1977 (FMSHA), 30 U.S.C. § 801-960, violated their Fourth Amendment right to be free from such searches. The Secretary moved for reconsideration and in a memorandum and order dated May 30, 1979, the Court again denied the motion for a preliminary injunction.

In both memoranda, this Court recognized that in limited circumstances warrantless searches are permitted. *See United States v. Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970).

The Supreme Court's opinion in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) was relied upon extensively in the denial of the Secretary's motions. Quoting in part from that case, in the May 30, 1979 memorandum and order this Court stated:

> In *Barlow's* the Supreme Court articulated why warrantless searches are permissible in certain industries (e.g., liquor and firearms) by stating "when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation." The court further stated "the element that distinguishes these enterprises from ordinary businesses is a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware." *Barlow's, Inc.*, 436 U.S. at 313.

Focusing on this language, this Court held that warrantless searches of stone quarries are not constitutionally permissible under FMSHA because such businesses do not have a long tradition of government regulation. It was found that federal regulation of stone quarries did not commence until 1966. *See* the May 30, 1979 memorandum and order at 3.

The Secretary has now moved for summary judgment in effect asking again for reconsideration of the denial of his motion for a preliminary injunction. Parenthetically, the Secretary is seeking relief under 30 U.S.C. § 818(a)(1)(C) which authorizes the Secretary to seek an injunction when a mine operator or his agent "refuses to admit [the Secretary's] representatives to the coal or other mine . . . ." Plaintiff seeks entry to conduct an inspection of possible safety violations by the defendants.

Subsequent to the May 30, 1979 memorandum and order, Judge Myron L. Gordon of this district in *Marshall v. Cedar Lake Sand & Gravel Co.*, No. 79-C-181 (E.D. Wis. Nov. 9, 1979) and three circuit courts, *Marshall v. Sink*, No. 77-2614 (4th Cir. Jan. 24, 1980) *Marshall v. Nolichuckey Sand Co.*, 606 F.2d 693 (6th Cir. 1979), *cert. denied sub nom., Nolichuckey Sand Co. v. Marshall*, 48 U.S.L.W. 3678 (Apr. 21, 1980), and *Marshall v. Stoudt's*

Ferry Preparation Co., 602 F.2d 589 (3d Cir. 1979), *cert. denied sub nom., Stoudt's Ferry Preparation Co. v. Marshall*, 48 U.S.L.W. 3435 (Jan. 7, 1980), have each found the preliminary injunction procedure outlined in FMSHA constitutional. In their opinion, warrantless searches of stone quarries and sand pits do not offend the constitution since these are pervasively regulated businesses.

In *Stoudt's Ferry* the court reached its decision by comparing FMSHA with the Occupational Safety and Health Act (OSHA). The court did this to determine the effect of the Supreme Court's holding in *Marshall v. Barlow's Inc.*, *supra*, that the warrantless provisions of OSHA were unconstitutional. The Court in *Stoudt's Ferry* held:

> Although the Mine Safety Act's coverage of enterprises has been broadened from that of the predecessor Coal Mine Safety Act to include other than coal mining, the statute is still much more limited than OSHA and is aimed at an industry with an acknowledged history of serious accidents. Moreover, unlike OSHA, the Mine Safety Act mandates periodic inspections and is specific in that no advance warning is to be given when the inspection is to determine whether an imminent danger exists or whether there is compliance with mandatory health and safety standards or with any citations, orders, or decisions outstanding, 30 U.S.C.A. § 813(a). If the inspection is for obtaining or disseminating information about health and safety conditions, causes of accidents, or gathering of information about mandatory health and safety standards, the Secretary may give advance notice. *Id.*
>
> It may be seen that the Mine Safety inspection provision places limitations upon the purposes for which searches may be made, limits those in which no advance notice is given, and is more narrowly drawn than the comparable OSHA section. There is consequently less likelihood of the abuses of "unbridled discretion of executive and administrative officers" which *Barlow's* found objectionable. 436 U.S. at 323, 98 S.Ct. at 1825. Though *Barlow's* was not impressed with the importance of surprise inspections in the

> OSHA setting, we are not prepared to say that the legislative judgment as to their necessity in the context of mine safety is misplaced. *Marshall* v. *Stoudt's Ferry Preparation Co.*, 602 F.2d at 594.

The court was also impressed by the procedures provided for under 30 U.S.C. § 818, stating:

> Another significant difference between the statutes is that the Mine Safety Act provides for immediate judicial review by requiring the Secretary to secure an injunction in the district court if he is refused entry. 30 U.S.C.A. § 818. Any unusual privacy expectations may be fully explored in that proceeding and a reasonable accommodation may be achieved. *Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d at 594.

In *Marshall v. Nolichuckey Sand Co., supra,* the court noted that the sand and gravel extraction industry has neither "the long history of regulation referred to in *Colonnade* [nor] the extensive licensing scheme which was present in both *Colonnade* and *Biswell.*" 606 F.2d at 695. However, the court found that the gravel industry, as recognized by Congress, exposes miners to "severe health and safety hazards." *Id.* Consequently, the court found the warrantless inspection provisions of FMSHA are reasonable.

In *Marshall v. Sink, supra,* the Fourth Circuit Court of Appeals echoed the themes of *Stoudt's Ferry* and *Nolichuckey Sand* noting the "overriding governmental interest in the safety of miners." No. 77-2614 at 5. It further held that "Congress has a legitimate interest in protecting all persons from these hazardous conditions as it does in protecting any employee in a large mine. *Id.* Finally, that court also noted that any privacy interests can be protected by the preliminary injunction procedure provided for in the statute.

It is important to note that in *Marshall v. Sink, supra,* the court found that the injunction procedure "permits the operator to present his objections to a district court before . . . any sanctions are imposed." The case before this Court, however, illustrates that just the opposite is true.

The preliminary injunction procedure may provide a method by which a gravel pit operator can have his privacy interests protected, but it is at a cost that, in reality, curtails the utilizations of such privacy expectations. In the case at bar, the inspector, Walter C. Brey, issued a citation for denial of entry when defendant's president, Douglas E. Dewey, refused to allow Brey to continue a safety inspection of the pit. (Plaintiff's brief of October 16, 1979, in support of its motion for summary judgment). This citation eventually resulted in a penalty of $1,000.00. (*Secretary of Labor, MSHA v. Waukesha Lime & Stone*, VINC 79-66 PM, A.O. No. 47-00235-05003 (June 5, 1979); letter of February 6, 1980 from Francis Croak defendants' attorney).

While the preliminary injunction proceedings may get the defendants into court to vindicate their constitutional rights, the cost to them is indeed quite high. It seems a strange procedure to impose such a burden on a citizen in order to enjoy the fruits of the Fourth Amendment which courts are enjoined to liberally construe, and to which all owe a duty of vigilance for its effective enforcement, lest there be an impairment of those very rights for which it was adopted. *Ker v. State of California*, 374 U.S. 23 (1963). This is a particularly high cost to pay to protect valid privacy claims. The mine operator must choose between protecting valid privacy interests or his pocketbook. In essence, the injunctive procedure does not present a fair means for protecting privacy interests.

As this Court previously opined, the exceptions which the Supreme Court has heretofore engrafted upon the warrant requirement (firearms and alcohol) present quite different situations from stone quarries. The *Biswell-Colonnade* exception involves businesses that are not only closely regulated, but also have a long history of such regulation. Although quarries have been in existence for thousands of years, only when Congress decided in 1966 to incorporate them within the Mine Safety Act did quarries become pervasively regulated in this country. Unlike firearms and alcohol, and to some extent coal mines, quarries have not had a long history of pervasive regulation.

Therefore, the regulation of quarries fails to meet the requirement of the *Biswell-Colonnade* exception to the Fourth Amendment rule requiring warrants for searches of private premises.

In light of the foregoing, this Court is persuaded that, without circuit precedent in point and with due regard to the basic constitutional issue at stake, it must adhere to its prior position, deny plaintiff's motion for summary judgment and grant summary judgment in favor of defendants on the basis that 30 U.S.C. § 818 is unconstitutional and thus unenforceable.

SO ORDERED this 10th day of July, 1980, at Milwaukee, Wisconsin.

ROBERT W. WARREN
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JUL 15, 1980

Civil Action File No. 79-C-114

RAY MARSHALL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF

v.

DOUGLAS DEWEY AND WAUKESHA LIME & STONE CO., WAUKESHA, WISCONSIN, DEFENDANTS.

JUDGMENT

This action came on for (hearing) before the Court, Honorable Robert W. Warren, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered, denying plaintiff's motion for summary judgment and granting defendants' motion for summary judgment,

It is Ordered and Adjudged that the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801-960, in so far as they allow warrantless searches of stone quarries, is unconstitutional and thus unenforceable.

Approved: /s/ _____
ROBERT W. WARREN
U.S. Dist. Judge

Dated at Milwaukee, Wisconsin, this 15th day of July, 1980.

_____
RUTH W. LA FAVE
Clerk of Court

By /s/ _____
G. BUDELMAN
Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JULY 22, 1980

Mr. Page H. Jackson
Office of the Solicitor
U.S. Dept. of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Mr. Francis R. Croak
Cook & Franke
660 E. Mason St.
Milwaukee, WI 53202

Re: *Secretary of Labor* v. *Douglas Dewey, et al.*, Case No. 79-C-114

Dear Counsel:

It has come to the Court's attention that there is a clerical error in the memorandum and order issued July 10, 1980 in regard to the above-entitled case.

The error appears in the last line, second paragraph, on the last page of the order. Enclosed please find a corrected last page, which should be substituted for the one previously sent, and a copy of the amended judgment.

Very truly yours,

/s/ _____
ROBERT W. WARREN,
U.S. District Judge

RWW/msb
cc. Mr. Alan H. Yamamoto
Mr. Joseph C. Niebler

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JULY 22, 1980

Civil Action File No. 79-C-114

RAY MARSHALL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF

v.

DOUGLAS DEWEY AND WAUKESHA LIME & STONE CO., WAUKESHA, WISCONSIN, DEFENDANTS.

AMENDED JUDGMENT

This action came on for (hearing) before the Court, Honorable ROBERT W. WARREN, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered, denying plaintiff's motion for summary judgment

It is Ordered and Adjudged that 30 U.S.C. § 813(a) insofar as it allows warrantless searches of stone quarries, is unconstitutional and thus unenforceable.

Approved: /s/ _____
ROBERT W. WARREN
U.S. District Judge

Dated at Milwaukee, Wisconsin, this 22nd day of July, 1980.

_____
RUTH W. LA FAVE
Clerk of Court

By /s/ _____
N. BUDELMAN
Deputy Clerk

As this Court previously opined, the exceptions which the Supreme Court has heretofore engrafted upon the warrant requirement (firearms and alcohol) present quite different situations from stone quarries. The *Biswell-Colonnade* exception involves businesses that are not only closely regulated, but also have a long history of such regulation. Although quarries have been in existence for thousands of years, only when Congress decided in 1966 to incorporate them within the Mine Safety Act did quarries become pervasively regulated in this country. Unlike firearms and alcohol, and to some extent coal mines, quarries have not had a long history of pervasive regulation. Therefore, the regulation of quarries fails to meet the requirement of the *Biswell-Colonnade* exception to the Fourth Amendment rule requiring warrants for searches of private premises.

In light of the foregoing, this Court is persuaded that, without circuit precedent in point and with due regard to the basic constitutional issue at stake, it must adhere to its prior position, deny plaintiff's motion for summary judgment and grant summary judgment in favor of defendants on the basis that 30 U.S.C. § 813(a) is unconstitutional and thus unenforceable.

SO ORDERED this 10th day of July, 1980, at Milwaukee, Wisconsin.

/s/ _____

ROBERT W. WARREN
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

AUGUST 11, 1980

Case No. 79-C-114

RAY MARSHALL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF

v.

DOUGLAS DEWEY AND WAUKESHA LIME & STONE CO., WAUKESHA, WISCONSIN, DEFENDANTS.

MEMORANDUM AND ORDER

On July 30, 1980, the Secretary of Labor filed a motion to alter or amend or, in the alternative, to stay the judgment entered by this Court in the above-entitled action on July 15, 1980 and amended on July 22, 1980.

In the *memorandum and order* supporting its judgment, the Court held that regulations of stone quarries failed to meet the requirement of the *Biswell-Colonnade* exception to the Fourth Amendment rule requiring warrants for searches of private premises. [*See United States v. Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970).] Consequently, the Court granted summary judgment in favor of the defendants on the ground that 30 U.S.C. § 813(a) is unconstitutional and thus unenforceable.

The Secretary's motion is based on eight grounds. The first six grounds are all directed to the propriety of civil penalties under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et. seq*. Since the Court's decision rested on the unconstitutionality of the right of entry pro-

vision (30 U.S.C. § 813(a)), the arguments relating to the propriety of the civil penalties do not set forth valid reasons for altering, amending or staying the judgment and must be denied.

The Secretary's seventh ground in support of its motion is that "this Court, to the extent that it distinguishes 'stone quarries' from other mines covered by the Act, fails to address the authority of Congress to make reasonable classifications in enacting legislation." (Plaintiff's motion, page 2.)

The Secretary's argument is without merit. In its opinion, the Court closely examined the long history of pervasive regulation which justified congressional action in the area of mines and found that stone quarries were not among the mines historically regulated. In reaching that decision, the Court implicitly held that the inclusion of stone quarries as a covered mine in the FMSHA was unreasonable. Consequently, the Secretary's motion to alter or amend the judgment on the ground that the Court failed to address the authority of Congress to make reasonable classification must be denied.

Finally, the Secretary argues that the judgment and memorandum are inconsistent. Since the judgment and *memorandum and order* were amended on July 22, 1980 to correct *any* inconsistencies, the Court also rejects this argument.

Based on the foregoing, plaintiff's motion to alter or amend the judgment or, in the alternative, to stay the judgment must be and is hereby denied.

SO ORDERED this 11th day of August, 1980, at Milwaukee, Wisconsin.

/s/ _____

ROBERT W. WARREN
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

MARCH 29, 1979

Case No. 79-C-114

RAY MARSHALL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF

v.

DOUGLAS DEWEY AND WAUKESHA LIME & STONE CO., WAUKESHA, WISCONSIN, DEFENDANTS.

MEMORANDUM AND ORDER

This is a simple case, factually. The government, through one Walter C. Brey, wishes to inspect defendant's quarry pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801-960. To illustrate the dangers of a quarry, the government points to the death of Douglas J. Bartell, who "was killed on September 16, 1975 when he was buried in a mixture of gravel and limestone" at defendant's site. (Brey Affidavit).

Mr. Brey inspected defendant's location on September 17, 1975 and issued two notices of violations of safety standards. On April 25, 26 and 27 of 1978, Mr. Brey conducted a follow-up safety and health inspection at which time 25 citations were issued for violations of mandatory health and safety standards. Then, on July 10, 1978, Mr. Brey returned to make another inspection in order to determine whether defendant had corrected one problem, namely the exposure to silica-bearing dust by an employee bagging lime. Defendant refused to permit Mr. Brey to conduct a search and demanded he obtain a valid search warrant prior to inspection.

The government in this action is seeking a preliminary injunction enjoining defendant from refusing to permit inspection of its mines. The sole issue presented by this action is whether the Federal Mine Safety and Health Act, as applied to quarries, permits the government through the Secretary of Labor to conduct warrantless searches.

In order to grant a preliminary injunction, four prerequisites must be met: (1) plaintiff must show that he has no adequate remedy at law and will be irreparably harmed if the injunction does not issue; (2) that the plaintiff has a reasonable likelihood of success on the merits; (3) that in granting the preliminary injunction, the Court will not disserve the public interest; and (4) that any threatened injury to the plaintiff outweighs the injury the injunction may cause the defendant. *Fox Valley Harvestore, Inc. v. A.O. Smith Harvestore Products*, 545 F.2d 1096 (7th Cir. 1976). Furthermore, plaintiff has the burden of persuasion on all of these prerequisites. *Id.*

Although all four elements must be overcome before a preliminary injunction will issue, in this case particular emphasis must be placed upon the second element, namely plaintiff's likelihood of success on the merits. The key decision bearing on this case is the Supreme Court's holding in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) wherein the Court held that the Occupational Health and Safety Act (OSHA) did not permit the government to conduct warrantless searches.

In ruling on the issue presented in *Barlow's*, the Supreme Court held that there are exceptions to the search warrant requirements, *e.g.*, those businesses subject to close supervision or regulation. *United States v. Biswell*, 406 U.S. 311, 316 (1972) and *Colonnade Catering Corp., v. United States*, 397 U.S. 72, 74, 77 (1970). In discussing why warrantless searches are permitted in certain industries (*e.g.* liquor and firearms) the Court stated "when an entrepeneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation." *Marshall v. Barlow's, Inc.*, 436 U.S. at 313. In further elucidating the limited class of searches in which a warrant is not required the Court held

"The element that distinguishes these enterprises from ordinary businesses is a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware." *Id.*

The only conclusion that can be drawn from reading the Court's decision in *Marshall v. Barlow's, Inc., supra*, is that warrantless searches are only permissible in extremely narrow circumstances. In reviewing the facts of the present case, this Court is drawn to the conclusion that the Federal Mine Safety and Health Act of 1977, as applied to quarries, does not permit the Secretary of Labor to conduct warrantless searches.

First, the Federal Coal Mine Health and Safety Act of 1969 was only amended to cover mines other than coal mines in 1977 by Public Law 95-164. The Act as applied to other mines did not even become effective until March 9, 1978. Therefore, the long continuous regulation mentioned by the Supreme Court is absent. Secondly, the Secretary does not describe any unusual circumstances in the quarry type of businesses to necessitate a warrantless search.

Plaintiff cites *Youghiogheny and Ohio Coal Co. v. Morton*, 364 F. Supp. 45 (S.D. Ohio 1973) for the proposition that warrantless searches in mines are permissible. First, that case dealt with underground coal mines rather than quarries; second, that case was decided prior to *Marshall v. Barlow's, Inc., supra*, and thus that case must be placed in the balance. With these distinctions in mind, the Court does not find that a warrantless search is justified in this case, even assuming that *Youghiogheny* is correct.

Therefore, since the Secretary of Labor has failed to show a reasonable likelihood of success on the merits, his motion for a preliminary injunction must be and hereby is denied.

Defendants have requested the Court, however, to issue a preliminary injunction in its favor. Defendants express the fear that the government will try further warrantless searches and then issue citations to defendants for their refusal. Defendants' request must be denied at this time.

The government has represented to the Court that it will not pursue any warrantless searches. If the government does attempt to conduct searches and issues citations, the Court stands ready to reconsider defendant's request. At this time, the irreparable harm element is absent.

Therefore, plaintiff's petition for a preliminary injunction must be and hereby is denied. Furthermore, defendant's request for a preliminary injunction is also denied.

SO ORDERED this 29th day of March, 1979, at Milwaukee, Wisconsin.

/s/ _____

ROBERT W. WARREN
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

MAY 30, 1979

Case No. 79-C-114

RAY MARSHALL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF

v.

DOUGLAS DEWEY AND WAUKESHA LIME & STONE CO., WAUKESHA, WISCONSIN, DEFENDANTS.

MEMORANDUM AND ORDER

On March 9, 1979, an oral hearing was held on plaintiff's motion for a preliminary injunction, and based upon oral argument and written briefs, the Court denied plaintiff's motion. The Court's opinion, which was read into the record on March 9, 1979, was put into written form and signed on March 29, 1979. Plaintiff has moved for reconsideration, claiming that the Court erred when it held that quarries were not pervasively regulated industries.

In the present case, plaintiff seeks to enjoin defendant from refusing to permit plaintiff to conduct inspections without warrants. Of course warrantless searches are ordinarily impermissible. However, the Supreme Court has recognized that in certain limited circumstances, warrantless searches are permitted. *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978); *United States v. Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970). In *Barlow's*, the Supreme Court articulated why warrantless searches are permissi-

ble in certain industries (*e.g.*, liquor and firearms) by stating "when an entrepeneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation." The court further stated "the element that distinguishes these enterprises from ordinary businesses is a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware." *Barlow's, Inc.*, 436 U.S. at 313. The question presented in the present case is whether the stone quarry industry is pervasively regulated.

The Court would note that the first federal statute regulating stone quarries was the Federal Metal and Nonmetallic Mine Safety Act, 30 U.S.C. § 721 *et. seq.*, enacted by congress in 1966. This legislation is discussed in S. Rep. No. 1296, 89th Cong., 2d Sess. 2, reprinted in [1966] U.S. Code Cong. & Ad. News 2846. In that report, it is pointed out that in 1961 Public Law 87–300 was passed authorizing the Secretary of the Interior to conduct a study of state mine safety laws and the health hazards of mines. Apparently this report, attached as an appendix to plaintiff's brief, formed the basis of the 1966 legislation. The Federal Metal and Nonmetallic Mine Safety Act, 30 U.S.C. § 721 *et. seq.* was succeeded by the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* The latter act, specifically 30 U.S.C. § 813(a), permits warrantless inspections.

Regulation of stone quarries by the federal government, therefore, commenced in 1966. Prior to the federal laws, some of the several states regulated mines, but in a haphazard and ineffective manner. The federal legislation passed in 1966, as reflected by Senate Report 1296, was aimed at comprehensive regulation.

In this Court's opinion, the tradition of pervasive regulation of the stone quarry industry did not commence until 1966. The survey conducted pursuant to Public Law 87–300 shows loose and at times non-existent regulation of stone quarries prior to the federal regulation enacted in 1966. Several federal district courts have found that the mining industry, *i.e.*, gravel quarries and the like, is per-

vasively regulated such that warrantless inspections are permissible. *Marshall v. The Texoline Co.*, No. 4-78-49 (N.D. Texas, Mar. 23, 1979); *Marshall v. Nolichucky Sand Co.*, No. 2-78-108 (E.D. Tenn. Dec. 14, 1978); *Andrus v. Magma Copper Co.*, No. 77-765 (D. Ariz. Jan. 16, 1978). In an action brought before Chief Judge Reynolds of this district, he found that the plaintiff had not shown that the stone quarry industry was pervasively regulated and thus he denied plaintiff's motion for a preliminary injunction. *Marshall v. Halquist Stone Co.*, No. 78-C-463 (E.D. Wis. Sept. 15, 1978).

The fourth amendment to the United States Constitution means what it says. Notwithstanding the Supreme Court having noticed several exceptions to the warrant requirement, in this Court's opinion, the pervasive regulation of the type found in the liquor industry, *e.g.*, had not existed until congress entered the field. Such late entry cannot meet the requirements set forth in *Barlow's*, *supra*.

Having reviewed the materials submitted by plaintiff, being aware of the flexible nature of the requirement that plaintiff must make a showing of "reasonable success of the merits," *Mullis v. Arco Petroleum*, 502 F.2d 290, 293 (7th Cir. 1974), and cognizant of "the presumption of constitutionality to which every duly enacted state and federal law is entitled . . .," *Lockport v. Citizens of Community Action*, 430 U.S. 259, 272 (1977), the Court, on reconsideration, must deny plaintiff's motion for a preliminary injunction. Plaintiff has not made the necessary showing under *Fox Valley Harvestore, Inc.* v. *A.O. Smith Harvestore Products*, 545 F.2d 1096 (7th Cir. 1976).

SO ORDERED this 30th day of May, 1979, at Milwaukee, Wisconsin.

/s/ _____

ROBERT W. WARREN
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

[Filed SEPTEMBER 9, 1980]

Case No. 79-C-114

RAY MARSHALL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF

v.

DOUGLAS DEWEY AND WAUKESHA LIME & STONE COMPANY, DEFENDANTS.

NOTICE OF APPEAL

NOW COMES the Plaintiff Secretary of the United States Department of Labor by his attorneys and gives notice pursuant to 28 U.S.C. § 1252 of his appeal to the Supreme Court of the United States from the decision and judgment entered in this action on July 15, 1980 as amended July 22, 1980 and from the order of August 11, 1980 denying the plaintiffs motion to alter, amend, or stay judgment.

Dated at Milwaukee this 10th day of September, 1980.

JOAN F. KESSLER
United States Attorney

By: /s/ _____
CHARLES H. BOHL
Assistant United States Attorney

☆U.S. GOVERNMENT PRINTING OFFICE 331921 115

No. 80-901

MAR 13 1981
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, APPELLANT

v.

DOUGLAS DEWEY AND WAUKESHA LIME AND
STONE COMPANY

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF WISCONSIN

JOINT APPENDIX

JURISDICTIONAL STATEMENT DOCKETED
December 4, 1980
PROBABLE JURISDICTION NOTED January 26, 1981

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Relevant Docket Entries

Plaintiffs: Secretary of Labor

Defendants: DEWEY, DOUGLAS and WAUKESHA LIME & STONE CO., Waukesha, WI

DATE	NR.	PROCEEDINGS
2/16/79	1	Complaint filed; summons issued.
2/16/79	2	Motion for Preliminary Injunction
2/16/79	3	Brief in support of motion for preliminary injunction.
2/23/79	4	Notice of retaining Miller & Niebler, S.C. as attorneys for defendants.
2/22/79	5	Marshal's return of service of S&C; deft. Douglas Dewey served 2/20/79.
3/2/79	6	Answer and affirmative defense of defendants.
3/2/79	7	Deft's answering brief.
3/7/79	8	Affidavit of Walter C. Brey, Mine Safety and Health Administration, U.S. Dept. of Labor.
3/9/79	9	Stipulation that Mr. Brey was refused permission to conduct inspection without valid search warrant.
3/9/79	10	Hearing on mot. for prel. inj. motion denied, respondent to prepare order.
3/29/79	11	Memorandum and order denying both partes' motion for summary judgment.
4/12/79	12	Pltf's motion for reconsideration of order of 3/29/79, denying the pltf's motion for preliminary injunction with exhibits.
4/19/79	13	Defts' answering brief to motion for reconsideration.
4/20/79	14	Affidavit of James Harris, dust plant foreman at Waukesha Lime & Stone.
5/30/79	15	Memorandum and order (RWW) denying pltf's motion for a preliminary injunction,
5/31/79	16	Status report (RWW); further status report on 10/26/79.
8/3/79	17	Pltf's notice to take deposition of Walter A. Bechthold on 8/8/79 in Milwaukee, with request for production.
8/3/79	18	Pltf's notice to take deposition of Edward Bull on 8/7/79 in Milwaukee, WI, with request for production.
8/3/79	19	Pltf's notice to take deposition of Jack Delany on

DATE	NR.	PROCEEDINGS
		8/7/79 in Milwaukee, WI, with request for production.
8/3/79	20	Pltf's notice to take deposition of Douglas Dewey on 8/8/79 in Milwaukee, WI, with request for production.
8/6/79	21	Stipulation and order (RWW) substituting Francis R. Croak as atty for defts.
8/30/79	22	Deposition of Walter A. Bechthold taken on 8/8/79.
8/30/79	23	Deposition of Edward H. Bull taken on 8/7/79.
8/30/79	24	Deposition of Jack E. Delaney taken on 8/7/79.
8/30/79	25	Deposition of Douglas E. Dewey taken on 8/8/79.
10/16/79	26	Pltf's motion for summary judgment with supporting brief.
10/31/79	27	Defts' brief in opposition to motion for summary judgment with affidavit of Douglas Dewey.
11/15/79	28	Pltf's reply to defts' brief in opposition to motion for summary judgment.
7/10/80	29	Memorandum and order (RWW) denying pltf's motion for summary judgment and granting defts' motion for summary judgment; further ordered that the Federal Mine Safety & Health Act of 1977, in so far as they allow warrantless searches of stone quarries, is unconstitutional and thus unenforceable.
7/15/80	30	Judgment entered pursuant to above memorandum and order; copies mailed to the parties
7/22/80	31	Amended judgment approved by Judge Warren; copies mailed to the parties.
7/25/80	32	Pltf's motion to alter or amend judgment and to stay judgment.
7/30/80	33	Pltf's motion to alter or amend judgment and to stay judgment.
8/6/80	34	Defts' brief in opposition to motion to alter or amend judgment and to stay judgment.
8/7/80	35	Amended Page two of 8/6/80 Motion.
8/11/80	36	Memorandum and order (RWW) that pltf's motion to alter or amend the judgment, or in the alternative, to stay the judgment is denied.
8/14/80	37	Pltf's reply to defts' brief in opposition to motion to alter or amend judgment or to stay judgment.
9/9/80	38	Pltf's notice of appeal to the Supreme Court of the U.S.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
CIVIL ACTION NO.

RAY MARSHALL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF

v.

DOUGLAS DEWEY AND WAUKESHA LIME AND STONE CO., WAUKESHA, WISCONSIN, DEFENDANTS

COMPLAINT

1. This action is brought under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, Public Law 91-173 as amended by Public Law 95-164, 91 STAT 1290, ("Act").

2. Jurisdiction is founded upon Section 108 of the Act, 30 U.S.C. § 818.

3. At all relevant times mentioned herein, Waukesha Lime and Stone Company operated a mine subject to the Act in or near Waukesha, Waukesha County, Wisconsin, within the jurisdiction of this Court.

4. On July 10, 1978, pursuant to Section 103 of the Federal Mine Safety and Health Act of 1977, an authorized representative of the Secretary of Labor went to the mine operated by defendants to conduct an inspection of that mine.

5. The authorized representative advised Douglas Dewey of his purpose for being at the mine and requested entry.

6. Defendant, Douglas Dewey, failed and refused to permit the authorized representatives of the Secretary to enter and inspect that mine. Affidavit of Walter C. Brey, Federal Safety and Health Inspector, is attached hereto as Exhibit 1 and made a part hereof.

7. Pursuant to Section 103 of the Act, the Secretary of Labor has a right of entry to defendant's mine.

8. Plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff respectively prays that the defendant, its agents and employees and all persons in active concert and participation with them be preliminary and permanently enjoined as follows:

1. From refusing to admit authorized representatives of the Secretary to, upon or through defendant's mine;

2. From refusing to permit the inspection of the mine by authorized representatives of the Secretary;

3. From interfering with, hindering, and delaying authorized representatives of the Secretary in carrying out the provisions of the Act; and

For such other relief as the court may deem just and proper.

WILLIAM J. MULLIGAN
United States Attorney

by _____
Assistant U.S. Attorney

_____

MORELL E. MULLINS
Associate Solicitor

_____

PAGE H. JACKSON
Trial Attorney

Attorneys for Secretary of Labor
Office of the Solicitor
Department of Labor
4015 Wilson Boulevard
Arlington, Virginia 22203
Telephone: (703) 235-1161

Exhibit 1

COUNTY OF DANE
STATE OF WISCONSIN

AUGUST 14, 1978

DIVISION OF MINE HEALTH AND SAFETY

AFFIDAVIT

Walter C. Brey, Mine Safety and Health Administration (MSHA), United States Department of Labor, being duly sworn according to law, deposes and says:

1. I am an authorized representative of the Secretary of Labor, employed by MSHA as a Federal Metal and Nonmetal mine inspector, and assigned to the Madison, Wisconsin field office. In this capacity I conduct inspections of metal and nonmetal mines pursuant to Section 103 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 *et seq.*, Public Law 91-173 as amended by Public Law 95-164 ("Act").

2. I have personal knowledge of the facts and circumstances mentioned herein.

3. On Monday, July 10, 1978 I traveled to the Waukesha Quarry and Mill which is located on highway 164 in or near Waukesha, Waukesha County, Wisconsin for the purpose of conducting a safety and health inspection of the quarry.

4. I arrived at the quarry at approximately 9:05 a.m. and initiated the inspection.

5. After starting the health portion of the inspection, I went to the company office to confer with Douglas Dewey, President, at 10:15 a.m.

6. Mr. Dewey presented an assessment sheet and pointed out that he was very upset over the amount of the assessment levied against the company for past violations.

7. Mr. Dewey then informed me that I would not be allowed to reenter the quarry property to finish the inspection without a search warrant.

8. I left the company property at approximately 10:25 a.m.

WALTER C. BREY

Sworn to and subscribed to before me, a Notary Public, this 18th day of August, 1978.

/s/ _____
Notary Public

My Commission expires December 23, 1979.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 79-C-114

RAY MARSHALL, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF,

v.

DOUGLAS DEWEY AND WAUKESHA LIME & STONE CO.,
WAUKESHA, WISCONSIN, DEFENDANTS.

ANSWER AND AFFIRMATIVE DEFENSE

ANSWER

Now come defendants, Douglas Dewey and Waukesha Lime & Stone Co., by their attorneys, Miller and Niebler S.C., in Answer to plaintiff's Complaint and say:

1. Admit that Douglas Dewey refused to allow Walter C. Brey, as representative of the Secretary of Labor, to enter and inspect the Waukesha Quarry and Mill for the purpose of conducting an investigation on July 10, 1978, demanding that a valid search warrant be obtained prior to inspection as alleged in the Affidavit of Walter C. Brey attached to the plaintiff's Complaint and made a part thereof.

2. Allege that Walter C. Brey was permitted to enter and inspect the Waukesha Quarry and Mill on several previous occasions including April 25, 26 and 27, 1978 and May 8, 1978.

3. Deny that Waukesha Lime & Stone Co.'s operation constitutes a mine within the meaning of the Federal Mine Safety and Health Act of 1977.

4. Deny that plaintiff has no adequate remedy at law and allege in that regard that if in fact the Act applies to defendants, plaintiff's proper remedy is inspection only after first obtaining a valid search warrant.

FIRST AFFIRMATIVE DEFENSE

As and for their First Affirmative Defense against the Complaint, defendants show to the Court as follows:

5. Reallege the allegations contained in Paragraphs 1 and 2 of defendants' Answer.

6. Allege that defendants are not engaged in an industry with a long history of pervasive governmental regulation of the type which would justify a warrantless search.

7. Allege that the Federal Mine Safety and Health Act of 1977 was not intended to apply, and it does not apply, to defendants and industries such as defendants' which lack a long history of pervasive governmental regulation and which does not constitute a "mine" within the meaning of said Act and does not fall under its jurisdiction.

SECOND AFFIRMATIVE DEFENSE

As and for their Second Affirmative Defense against plaintiff's Complaint, defendants show to the Court as follows:

8. Reallege the allegations in Paragraphs 5 and 6 of defendants' First Affirmative Defense.

9. Allege that the application of the provision(s) of the Federal Mine Safety and Health Act of 1977, which authorizes warrantless searches, to defendants violates rights guaranteed to defendants under the Fourth Amendment of the Constitution of the United States.

WHEREFORE, defendants respectfully demand:

1. An Order of this Court directing the Secretary of Labor of the United States Department of Labor and his agents to restrain from enforcing the Federal Mine Safety and Health Act of 1977 against defendants or in the alternative an order directing the Secretary of Labor of the

United States Department of Labor and his agents to obtain a search warrant prior to any investigation or search of defendants' operations at Waukesha Quarry and Mill.

2. An Order of this Court dismissing plaintiff's Complaint, together with costs, disbursements and attorney's fees.

3. Any other relief as this Court may deem just and equitable.

Dated this 2nd day of March, 1979.

MILLER AND NIEBLER S.C.
Attorneys for Defendants

By _____
FREDERIC G. BALDOWSKY

P.O. Address:
Suite 500
611 North Broadway Street
Milwaukee, Wisconsin 53202
Telephone: (414) 271-2700

COUNTY OF DANE
STATE OF WISCONSIN

AFFIDAVIT

Walter C. Brey, Mine Safety and Health Administration (MSHA) United States Department of Labor, being duly sworn according to law, deposes and says:

I am an authorized representative of the Secretary of Labor employed by MSHA as a Federal Metal and Nonmetal mine inspector. I have personal knowledge of the facts and circumstances mentioned herein.

Since 1975 I have been the federal mine inspector responsible for the inspection of metal and nonmetal mines in Waukesha, Kenosha, Racine, Washington, Milwaukee, Ozaukee, Walworth, Rock, Jefferson and Dodge counties in Wisconsin and have inspected all mines located in these counties. There are approximately 110 mines in these counties and all but two are sand and gravel pits or limestone quarries.

Waukesha Lime and Stone Company (hereinafter Waukesha) operates a mill and quarry in or near Waukesha, Waukesha County, Wisconsin. The mill and quarry are located on state highway 164 and are bisected by that road along a north-south axis.

On the west side of the highway Waukesha operates an agricultural lime preparation plant, a scale house, and the west quarry. On the east side of the highway Waukesha operates a primary crusher, a secondary crusher, and a screening section. In addition to limestone Waukesha produces gravel which is removed as a part of the overburden. This material is supplied to an asphalt plant located in the vicinity of the east quarry. This asphalt plant is owned by Mr. Walter Bechthold, Chairman of the Board of Waukesha. Approximately 30 persons are employed by Waukesha at the mill and quarry and numerous contract haulers are present at Waukesha on a daily basis.

On September 16, 1975, Douglas J. Bartell, a foreman at Waukesha, was killed when he was buried in a mixture of gravel and limestone in a hopper at the reclaim tunnel. As a result of a fatal accident investigation which I conducted on September 17, 1975, two notices of violations of mandatory safety standards related to the fatality were issued.

On April 25, 26, and 27, 1978, I conducted a safety and health inspection at Waukesha which resulted in the issuance of twenty-five citations for violations of mandatory safety and health standards. Two of these citations related to the amount of silica-bearing dust to which the employee bagging lime was exposed and the failure [of] Waukesha's management to require the employee to wear a respirator.

The purpose of my attempted inspection of July 10, 1978, was to resurvey the silica-bearing dust levels at the bagging station to determine whether Waukesha had corrected the situation.

On some of my inspection visits I have observed state inspection personnel on the Waukesha mine property. To the best of my knowledge and belief state inspection personnel are continuing to conduct warrantless inspections of the Waukesha quarry and mill.

/s/ _____
WALTER C. BREY

Sworn to and subscribed to before me a Notary Public this 6th day of March, 1979.

/s/ _____
Notary Public

My Commission expires December 23, 1979.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 79-C-114

RAY MARSHALL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF

v.

DOUGLAS DEWEY AND WAUKESHA LIME & STONE CO., WAUKESHA, WISCONSIN, DEFENDANTS

STIPULATION

The plaintiff and defendants in the above-encaptioned matter hereby stipulate to the facts set forth below:

1. On July 10, 1978, at approximately 9:05 A.M., Walter Brey went to the Waukesha Quarry and Mill, as representative of the Secretary of Labor, for the purpose of conducting a mine safety and health inspection.

2. When Mr. Brey went to the office of Mr. Douglas Dewey, President of Waukesha Lime & Stone Co., which operates Waukesha Quarry and Mill, at approximately 10:05 A.M., Mr. Dewey ordered Mr. Brey to leave the premises and demanded that a valid search warrant be obtained prior to inspection.

Dated this 7th day of March, 1979.

Respectfully Submitted,

/s/ _____
PAGE H. JACKSON
Attorney for Plaintiff

MILLER AND NIEBLER S.C.
Attorneys for Defendants

By /s/_____
FREDERIC G. BALDOWSKY

[1]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

No. 79-C-114

RAY MARSHALL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF,

v.

DOUGLAS DEWEY AND WAUKESHA LIME & STONE CO., WAUKESHA, WISCONSIN, DEFENDANTS

TRANSCRIPT OF PROCEEDINGS

HEARING: Deposition of Walter A. Bechthold

DATE: August 8, 1979

TIME: 10:05 a.m.

PLACE: 517 East Wisconsin Avenue

REPORTER: Brenda L. Woltman

* * * * *

[5] Q At the time you purchased Waukesha Lime & Stone were you aware of the fact that the State was inspecting it for safety?

A Well, I think we had the same inspector come around inspecting our material, our equipment, that was inspecting them, the State.

[23]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

No. 79-C-114

RAY MARSHALL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF,

v.

DOUGLAS DEWEY AND WAUKESHA LIME & STONE CO., WAUKESHA, WISCONSIN, DEFENDANT

TRANSCRIPT OF PROCEEDINGS

HEARING: Deposition of Edward H. Bull

DATE: August 7, 1979

TIME: 11:00 a.m.

PLACE: 517 East Wisconsin Avenue, Milwaukee, WI

REPORTER: Brenda L. Woltman

* * * * *

[34] Q Your authority is based upon Chapter 1—is it 101 of the Wisconsin Statutes?

A It is 101.11 of the State Statutes, which deals with the Industrial—Department of Industry & Labor. We like to call it the Industrial Commission if you're as old as I am.

* * * * *

[35] Q And is it your understanding that the statutes that provided for these inspections provided for the inspection of any business in Wisconsin that was subject to Workmen's Compensation Law?

A That's correct.

Q And that would be any employer who had two or more employees?

A In the old days it was three or more, and then somewhere along the line somebody changed it to one. The farmers got caught in six employees, but that was about it. Today almost everybody's under the act.

* * * * *

[37] Q All right. Do I gather that this mining engineer that you referred to who was a State employee from 1919 to 1949 was the only person whose sole responsibility was mining during that period?

A Well, not in the way that's said. His responsibility, yes, was that, but then, like I say, each area of the state had a general safety inspector, and those general safety inspectors would on his request make checks just like our Mr. Sigurdson did on these files.

Q Well, I don't know Mr. Sigurdson, but I gather that one day he could be at a quarry and the next day he could be at the International Harvester foundry in Waukesha?

A That is correct.

Q And the third day he could be at the A & P store in Waukesha?

A That is correct. He was a good man.

Q In other words, his responsibility was anything covered by Chapter 101?

A That is right. And at the request of the various—now, the electrician, we didn't have an electrical [38] engineer like we do today, and we would call up—oh, in the early days it was adjusting the beams of headlights and all kinds of crazy things like that. He could be involved in many things.

* * * * *

[41] Q Is there any agreement such as you had with OSHA with the U.S. Bureau of Mines for inspections?

A I think our agreements have been verbal. I like to think that we work fairly good together.

Q But you're not aware of any formal agreements between the two parties?

A No. I know probably what you have in mind. There was [42] a time when the states were asked to sign agreements. I had a letter from the Governor at one time indicating that we should try to promulgate an agreement with what they called MESA in those days.

And, of course, we reviewed the whole thing with the State of Arizona, which was one of the jewels of this thing. They had the first contract and all this and that with MESA. But then our own people at the Department of Industry & Labor simply indicated there need not—or they didn't want an agreement of that type. So, since then we wandered along without an agreement. It is more or less verbal what we have.

* * * * *

[45] Q I notice that there's a note on Page 1 of Chapter 1 which says, "The following rules are based on rules of Title 30, Mineral Resources, Chapter 1, Bureau of Mines, Department of Interior, published in the Federal Register, Volume 34, July 31, 1969."

A That would be the thing.

Q That would be the date they published it?

A Yes.

Q The date here is 5/1/72. That would be your date?

A That would be our date more or less at that point.

[46] Q Was this thing which became effective in '72 the first time that the Wisconsin Administrative Code had adopted a scheme which followed a federal scheme?

A In mining, yes.

* * * * *

[1]

BRENDA L. WOLTMAN—RPR

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
No. 79-C-114

RAY MARSHALL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF,

v.

DOUGLAS DEWEY AND WAUKESHA LIME & STONE CO., WAUKESHA, WISCONSIN, DEFENDANTS.

TRANSCRIPT OF PROCEEDINGS

HEARING: Deposition of Jack E. Delaney
DATE: August 7, 1979
TIME: 1:35 p.m.
PLACE: 517 East Wisconsin Avenue
REPORTER: Brenda L. Woltman

* * * * *

[4] Q Would you just very briefly tell me what happens when you arrive at the mine? I mean, do you go to the mine office and announce the fact that you're going to make an inspection or what is your usual routine?

A Yes. I do.

Q Well—

A I usually contact the mine office, Mr. Dewey there. And the supervisor now is Mr. Hojins, and Mr. Hojins usually accompanies me on the inspection.

Q Do you normally contact a representative of the miners and ask if they would like to come with you?

A No. I don't.

Q When you arrive at the mine office do you tell Mr. Dewey or his representative the particular purpose why [5] you're there, the reason you're there?

A Yes.

Q When I say that, I mean do you say, "I'm here to see whether you obeyed or fixed the violations"?

A Yes.

* * * * *

[9] Q Have there been occasions when you've made [10] inspections when you weren't accompanied by a representative of Mr. Dewey or by Mr. Dewey?

A No.

Q They always accompanied you?

A That's right. Sometimes not the same man will accompany for the whole inspection, maybe one guy for the east quarry and one guy for the shop and one person for the west quarry. It's always his representative comes along.

* * * * *

[12] Q Do you inspect things other than limestone quarries and the explosives?

A Yes. Well, we do limestone, underground, storage in use.

Q When you say "underground," what do you mean, "underground"?

A Underground mines.

Q Do you do underground excavation?

A We did one just recently at the request of OSHA.

Q Do you do tunneling?

A Pardon?

[13] Q Just general tunneling?

A Yeah, underground tunneling right.

* * * * *

Q And if I understand, your testimony was that management at Waukesha Lime has always voluntarily cooperated with you in your inspections. Is that correct?

[14] A Yes. They have.

* * * * *

Q Just for the record so there's no question about this, do you consider Waukesha Lime & Stone to be a safe operation?

A Yes. I do.

* * * * *

[1]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

No. 79-C-114

RAY MARSHALL, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF,

VS.

DOUGLAS DEWEY AND WAUKESHA LIME & STONE CO.,
WAUKESHA, WISCONSIN, DEFENDANTS.

TRANSCRIPT OF PROCEEDINGS

HEARING: Deposition of Douglas E. Dewey

DATE: August 8, 1979

PLACE: 517 East Wisconsin Avenue

REPORTER: Brenda L. Woltman

* * * * *

[13] Q Are there any signs on the dust house that say "Do not enter"? Is there anything to physically keep the customer from entering the dust house?

A The building?

Q The building.

A I don't know.

Q You don't know?

A I'm sorry. I don't know. There's not a physical barrier. I can attest to that.

Q From what I understand, no actual instructions are given at the gate, scale house, that the people are not to enter the dust house. Is that correct?

A You're catching us now in the middle of a change that's taking place right now under present regulations. We've just completed school and training, and we're in the process of making changes under the federal law, and we have not at this time installed additional items.

We have instructed our scale—the man at the scale to alert people about leaving their vehicles, et cetera. This has all just been changed. We completed the [14] school of our people last week.

Q So in the future you are going to instruct people to remain in their cars?

A We have to do that, yes.

Q You have to train your employees, but you don't necessarily have to tell the people—

A We have to train the employees to prohibit the people.

Q That's your own training plan, though. Is that correct?

A That will be part of it, yes.

Q But what I'm saying is the federal government didn't say you've got to tell the people to remain in their car. That was something you decided to do. Is that correct?

A No. They said in order to enter the various production areas, people must be trained. In other words, we'd have to school our customers.

* * * * *

[24] Q Are both bagging stations visible from the highway when the doors are open?

A I don't—if you were sitting on the highway, I don't believe you could see either bagger operator from the highway through the doors.

[25] Q Through the doors?

A I don't believe you could see them the way they sit.

Q How about from the railroad tracks?

A No. You wouldn't see them. I think they're shielded by this sheet metal I told you about.

* * * * *

[38] Q And why did you deny him entry?

A I felt it was my right.

Q Did you know why he was there? Did he tell you why he was at the mine or did he tell your superintendent?

A No. He did not tell me why he was there. You're talking at the time—

Q You told him to leave.

A —I asked him to get a search warrant. No. He didn't tell me why he was there at that time.

Q Did you know why he was there, though? I mean, did you assume he was there to see whether the dust had been fixed, the problem had been fixed?

A No. No.

* * * * *

Q You referred a moment ago to an inspection in April of this year by the State?

A That's correct.

Q How did they happen to be there if you know?

A I recall asking the State to come in and inspect us.

* * * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 79-C-114

RAY MARSHALL, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF,

v.

DOUGLAS DEWEY AND WAUKESHA LIME & STONE CO.,
WAUKESHA, WISCONSIN, DEFENDANTS.

STATE OF WISCONSIN
WAUKESHA COUNTY

DOUGLAS DEWEY, being first sworn, says:

1. He is the president of Waukesha Lime & Stone, and individual defendant in this action, and makes this affidavit in opposition to the motion of plaintiff for summary judgment.

2. It is the policy of Waukesha Lime & Stone Company that persons on the company premises, including state and federal investigators, union representatives and representatives of insurance companies, be accompanied by a representative of Waukesha Lime & Stone at all times. Such investigators are not permitted to roam, at will and unaccompanied, around the Waukesha operation. On rare occasions investigators known to Waukesha personnel have been permitted to go to specific locations on the Waukesha premises by themselves for limited purposes of specific investigations. This was the policy of Waukesha on and before July 10, 1978.

3. Customers are permitted in only a small portion of the Waukesha premises, namely the road extending from the scale house to the dust plant where buyers are permitted to pick up products purchased by them. There is a small office in the dust plant where an employee of Waukesha is on duty to assist customers with their orders. Customers are only permitted in the office area of the dust

plant. The area where bag machine operators work is an area where customers are not permitted. To the best of my knowledge, this is the area where any survey of silica-bearing dust levels at the bagging station would be performed. The foregoing has been true throughout the period of my employment at Waukesha.

/s/ _____
DOUGLAS DEWEY

Subscribed and sworn to before me this 30 day of October, 1979.

/s/ _____

Notary Public, State of Wisconsin
My Commission: Is permanent.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 79-C-114

RAY MARSHALL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF

v.

DOUGLAS DEWEY AND WAUKESHA LIME & STONE CO., WAUKESHA, WISCONSIN, DEFENDANTS

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE EXISTS NO GENUINE DISPUTE

1. The defendant Waukesha Lime & Stone Company (hereinafter Waukesha) operates a limestone quarry and mill in or near Waukesha, Waukesha County, Wisconsin. The defendant Douglas Dewey is employed by Waukesha and serves as president of the company. (Brey affidavit, March 6, 1979; Dewey dep. p. 3).

2. Materials produced by Waukesha at the quarry and mill enter interstate commerce. (Dewey Dep. p. 26).

3. On July 10, 1978, Walter Brey, an authorized representative of the Secretary of Labor, went to Waukesha quarry and mill to conduct a safety and health inspection pursuant to Section 103 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §813 (Supp I, 1977). Mr. Brey's specific purpose for being at Waukesha was to ascertain whether or not Waukesha had abated a prior violation relating to excessive amounts of silica dust levels at the bagging station at the "dust house". (Brey affidavit, March 6, 1978).

4. After placing dust monitoring equipment on the person operating the bagging station Mr. Brey went to the company office to confer with Douglas Dewey. (Brey affidavit, August 11, 1978).

5. Mr. Dewey presented an assessment sheet and pointed out that he was upset over the amount of the assessments levied against the company for past violations. Mr. Dewey then informed Mr. Brey that he could not reenter the quarry or mill without a search warrant. (Brey affidavit, August 11, 1978).

6. Mr. Brey retrieved his equipment and left the defendant's property. (Brey affidavit, August 11, 1978).

7. Waukesha is entirely owned by Payne & Dolan, Incorporated which operates an asphalt plant on property owned by Waukesha immediately adjacent to Waukesha's quarry & mill. (Dewey dep. pp. 4, 5; Bechthold dep. p. 6).

8. Payne & Dolan, Inc. began negotiations for the purchase of Waukesha in April 1967. The acquisition was effective May 1, 1967. (Dewey dep. p. 4, 5).

9. In April 1967 Payne & Dolan, Inc. was aware that Wauskesha was subject to safety and health inspections. (Bechthold dep. p. 5).

10. Waukesha's quarry and mill occupy a tract of land approximately 300 acres in size. This tract is bisected by state highway 164 the Little Fox River and the Milwaukee Road and Soo Line railroads. (Dewey dep. pp. 6, 7).

11. People purchasing limestone from Waukesha can either pick it up or have it delivered oy trucks provided by Waukesha. (Dewey dep. pp. 15, 16).

12. "Pickup customers" desiring bagged limestone stop at the scale house, the main entrance to the quarry and mill, where they place their order and receive a ticket. (Dewey dep. pp. 10, 11).

13. "Pickup customers" then proceed unescorted to the "dust house" where they present the dust house foreman with the ticket. The foreman may be inside the plant. (Dewey dep. pp. 11, 12, 13).

14. "Pickup customers" are not given oral instructions that they may not enter the dust house nor is there a physical barrier or written instructions on the building forbidding entry to the dust house. (Dewey dep. pp. 12, 13, 14).

15. On an average day approximately 100 trucks enter Waukesha's quarry and mill to pick up limestone. (Dewey dep. p. 17).

16. The dust house is located approximately 30 feet off of Highway 164, on the east side of the west quarry. There are no structures, such as a fence between the dust house and the highway. (Dewey dep. p. 7).

17. The dust house is basically an enclosure, consisting of a series of four wood bins and a steel bin enclosed by sheet metal siding. The enclosure has numerous openings and doors, ranging in width from two and one half to ten feet wide. These doors are kept open during hours of operation. (Dewey dep. pp. 23, 24).

18. Immediately adjacent to the east side of the dust house is a railroad spur operated and maintained by the Milwaukee Road railroad. Employees of the railroad come on to Waukesha's property to maintain the spur line. (Dewey dep. pp. 25, 26).

19. Waukesha, pursuant to condition No. 4 of its workmen's compensation insurance policy with Employees Mutual Casualty Company of Des Moines, Iowa, consented to inspections of its mill and quarry by representatives of that company. (Dewey dep. pp. 19, 20 Ex. 1).

20. Waukesha allows inspections by, and in fact has been inspected by the Teamsters Union and the International Union of Operating Engineers which represent approximately 26 of Waukesha's 32 employees. (Dewey dep. pp. 21, 22).

21. Waukesha has also been subject to inspections or investigations at the quarry and mill by the Internal Revenue Service, U.S. Department of the Treasury and the Wisconsin Department of Natural Resources. Dewey dep. p. 18).

22. Waukesha has been subject to safety and health inspections by the State of Wisconsin since approximately 1922. These inspections are for the purpose of obtaining compliance with mandatory standards applicable only to mine and mining. (Bull dep. pp. 5, 6).

23. Records of the State of Wisconsin indicate that state inspectors found "dust" related violations at the "dust house" in July 1953; July 1957; February 1967; and August 1967. (Bull dep. pp. 10, 11 Ex. 2; pp. 15, 16 Ex. 3; pp. 19, 20 Ex. 4; pp. 21, 22 Ex. 5).

24. On August 14, 1967, an atmospheric dust survey was conducted at the "dust house" at Waukesha's quarry and mill by the State of Wisconsin. An atmospheric dust survey involves the use of instruments to measure the atmosphere in the "dust house". (Bull dep. pp. 21, 22, Ex. 5).

25. Wisconsin safety inspectors generally inspect underground mines every two months and surface mines once a year. (Bull dep. p. 29).

26. Wisconsin safety inspectors do not obtain search warrants before making an inspection of mine operations. (Bull dep. p. 29).

27. Jack E. Delaney is employed by the State of Wisconsin, Department of Industry, Labor and Human Relations as a Mine Safety Specialist. (Delaney dep. p. 3).

28. In his capacity as a Mine Safety Specialist, Mr. Delaney has been assigned to inspect Waukesha's quarry and mill for the last six or seven years.

29. Mr. Delaney has never obtained nor has he been asked to obtain a search warrant prior to conducting an inspection at Waukesha. (Delaney dep. p. 11).

30. Waukesha has never restricted Mr. Delaney's access to any portion of the quarry or mill. (Delaney dep. pp. 6, 11; Dewey dep. p. 34).

31. On April 3, 1979, Mr. Delaney conducted an inspection of Waukesha as a result of a request by Douglas Dewey. The inspection required Mr. Delaney to be at the quarry and mill for the entire day. (Delaney dep. p. 7; Dewey dep. pp. 38, 39, 40).

32. During the conduct of that inspection Mr. Delaney was in that area of the "dust house" where the lime is bagged. In his inspection report Mr. Delaney noted six

violations of mandatory standards in the "dust house". (Dewey dep. p. 10).

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Supreme Court of the United States

No. 80-901

RAY MARSHALL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT,

v.

DOUGLAS DEWEY, ET AL.

APPEAL from the United States District Court for the Eastern District of Wisconsin.

The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted.

January 26, 1981

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No. 80-901

In the Supreme Court of the United States

OCTOBER TERM, 1980

RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

v.

DOUGLAS DEWEY and WAUKESHA LIME AND STONE COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

BRIEF FOR THE APPELLANT

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QUESTION PRESENTED

Whether Section 103(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. (Supp. II) 813(a), violates the Fourth Amendment insofar as it authorizes federal mine inspectors to conduct warrantless safety and health inspections of stone quarries.

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In the Supreme Court of the United States

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No. 80-901

RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

v.

DOUGLAS DEWEY and WAUKESHA LIME AND STONE COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

BRIEF FOR THE APPELLANT

OPINIONS BELOW

The main opinion of the district court (J.S. App. 1a-6a), as amended sua sponte (J.S. App. 8a, 10a), is reported at 493 F. Supp. 963. The opinion of the district court denying a motion by the Secretary of Labor to alter or amend the judgment (J.S. App. 11a-12a) is not reported. The opinions of the district court at the preliminary injunction stage (J.S. App. 13a-16a; *id.* at 17a-19a) are also not reported.

JURISDICTION

The judgment of the district court was entered on July 15, 1980 (J.S. App. 7a), and was amended sua sponte on July 22, 1980 (J.S. App. 9a). The district court denied the Secretary of Labor's motion to alter or amend the judgment on August 11, 1980 (J.S. App. 11a-12a). The Secretary filed a notice of appeal to this Court on September 9, 1980 (J.S. App. 20a). On October 30, 1980, Justice Stevens extended the time for docketing the appeal to and including December 8, 1980. The jurisdictional statement was filed on December 4, 1980, and the Court noted probable jurisdiction on January 26, 1981 (J.A. 30a). This Court has jurisdiction under 28 U.S.C. 1252. *Williams* v. *Zbaraz*, No. 79-4 (June 30, 1980).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. a. Section 103(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. (Supp. II) 813(a), provides:

> Authorized representatives of the Secretary [of Labor] or the Secretary of Health, Education, and Welfare shall make frequent inspections and investigations in coal or other mines each year

for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this subchapter or other requirements of this chapter. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection the Secretary of Health, Education, and Welfare may give advance notice of inspections. In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary [of Labor] shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year. The Secretary [of Labor] shall develop guidelines for additional inspections of mines based on criteria including but not limited to, the hazards found in mines subject to this chapter, and his experience under this chapter and other health and safety laws. For the purpose of making any inspection or investigation under this chapter, the Secretary [of Labor], or the Secretary of Health, Education, and Welfare, with respect to fulfilling his responsibilities under this chapter, or any authorized representative of the Secretary [of Labor] or the Secretary of Health, Education, and Welfare, shall have a right of entry to, upon, or through any coal or other mine.

b. Section 108(a)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. (Supp. II) 818 (a)(1), provides:

> The Secretary [of Labor] may institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which a coal or other mine is located or in which the operator of such mine has his principal office, whenever such operator or his agent—
>
> (A) violates or fails or refuses to comply with any order or decision issued under this chapter,
>
> (B) interferes with, hinders, or delays the Secretary [of Labor] or his authorized representative, or the Secretary of Health, Education, and Welfare or his authorized representative, in carrying out the provisions of this chapter,
>
> (C) refuses to admit such representatives to the coal or other mine,
>
> (D) refuses to permit the inspection of the coal or other mine, or the investigation of an accident or occupational disease occuring in, or connected with, such mine,
>
> (E) refuses to furnish any information or report requested by the Secretary [of Labor] or the Secretary of Health, Education, and Welfare in furtherance of the provisions of this chapter, or
>
> (F) refuses to permit access to, and copying of, such records as the Secretary [of Labor] or the Secretary of Health, Education, and Welfare determines necessary in carrying out the provisions of this chapter.

STATEMENT

1. Appellee Waukesha Lime and Stone Company operates a limestone quarry and mill facility in Waukesha, Wisconsin. Waukesha's operation is located on a 300-acre tract of land bisected by a state highway and two railroad lines (J.A. 26a). Waukesha employs about 30 full-time and two part-time workers (Dewey deposition at 21 (Aug. 8, 1979)).

Two quarries are located on Waukesha's property. The quarries consist of open pits that extend to a depth of 30 feet in certain places. The work at the quarries involves the use of explosives to dislodge pieces of rock from the quarry wall. The dislodged rock is loaded onto a truck by a mechanical loader and transported to a crushing facility where it is crushed and sorted according to size through a system of screens. The rock is then taken from the crusher to the "dust house" where it is dried, ground, and bagged (Dewey deposition at 6-10).

Customers may purchase and pick up limestone at Waukesha's facility, and on an average day approximately 100 trucks enter the company's property for this purpose (J.A. 26a-27a). "Pick-up" customers place their orders at the scale house located near Waukesha's main entrance and then proceed unescorted to the dust house to pick up their orders. Waukesha's customers are not specifically instructed that they may not enter the dust house (J.A. 26a).

In addition to Waukesha's customers, railroad employees regularly enter Waukesha's property to operate and maintain a spur line. Representatives from Waukesha's employees' unions also enter the premises, and Waukesha has consented to inspections of its operation by its workers' compensation insurance policy carrier. Furthermore, Waukesha's quarry and

mill have been inspected by representatives of the United States Department of the Treasury and the Wisconsin Department of Natural Resources (J.A. 27a; Dewey deposition at 18-22, 26).[1]

Since about 1922, quarries such as Waukesha's have been subject to safety and health inspections by representatives of the Wisconsin Department of Industry, Labor and Human Relations to ensure compliance with mandatory state mining standards (J.A. 27a; Delaney deposition at 3-5 (Aug. 7, 1979)).[2] State safety engineers generally conduct inspections of underground mines every two months and of surface mines once each year. Wisconsin mine inspectors do not obtain or produce search warrants before inspecting mines. State records indicate that the quarry now run by Waukesha was inspected and dust related violations in the dust house were cited in July

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[1] Pursuant to 18 U.S.C. 843(f), the Secretary of the Treasury is authorized to inspect explosive materials stored at mining facilities such as Waukesha's (see page 32, *infra*). The Wisconsin Natural Resources Department conducts inspections of water pumped by Waukesha and other industries into nearby rivers to ensure compliance with pollution control standards (Dewey deposition at 18).

[2] The most recent state inspection of Waukesha's operation that is noted in the record was conducted in April 1979 by Jack Delaney, a state mine safety specialist (J.A. 28a). This inspection took the entire day and covered all areas of Waukesha's operation; Delaney noted 26 violations of mandatory standards, six of which were in the dust house (J.A. 28a-29; Delaney deposition at 7, 8, 10). In the previous six years, Delaney inspected the Waukesha facility six or seven times and conducted a "re-inspection" almost every time (Delaney deposition at 5). Delaney never obtained or was asked to obtain a search warrant when inspecting Waukesha's facility and was not restricted in his access to any areas of the quarry and mill (J.A. 28a).

1953, July 1957, and February 1967 (J.A. 28a). Waukesha's present owner, Payne & Dolan, Inc., purchased the Waukesha quarry and mill facility in May 1967. Payne & Dolan was aware at the time of the purchase that the facility was subject to safety and health inspections (J.A. 26a).

2. Since 1966, Waukesha's quarry and mill operation has also been inspected regularly for health and safety violations by federal mine inspectors under Section 103(a) the Federal Mine Safety and Health Act of 1977 (Mine Safety Act), 30 U.S.C. (Supp. II) 813(a), or a predecessor statute, the Federal Metal and Nonmetallic Mine Safety Act of 1966, 30 U.S.C. 723, 724. Following an inspection of Waukesha's facility in April 1978, Walter Brey, a federal mine inspector, issued 25 citations for violations of mandatory health and safety standards (J.S. App. 13a). An earlier inspection, conducted in September 1975 after the work-related death of one of Waukesha's employees, had resulted in the issuance of two notices of safety violations (*ibid.*).

On July 10, 1978, Brey attempted to conduct another inspection of Waukesha's quarry and mill pursuant to the Mine Safety Act. The purpose of this inspection was to determine whether Waukesha had corrected one of the violations of mandatory federal health standards discovered during Brey's inspection in April 1978. Specifically, Brey intended to ascertain whether Waukesha had sufficiently reduced the amount of silica-bearing dust to which an employee bagging stone in the dust house had been exposed (J.A. 11a, 25a).

After Brey had been at the Waukesha premises for an hour, he went to see Waukesha's president,

appellee Douglas Dewey. Dewey refused to allow Brey to continue his inspection unless he obtained a search warrant (J.A. 3a, 5a-6a, 7a, 12a, 25a-26a). Brey thereupon issued a citation to Waukesha, pursuant to Section 104(a) of the Mine Safety Act, 30 U.S.C. (Supp. II) 814(a), for denial of entry (J.S. App. 5a).[3]

3. On February 23, 1979, the Secretary filed this civil action against appellees Dewey and Waukesha in the United States District Court for the Eastern District of Wisconsin, pursuant to Section 108(a)(1) of the Mine Safety Act, 30 U.S.C. (Supp. II) 818 (a)(1). The Secretary's complaint sought injunctive relief barring appellees from refusing to permit warrantless inspections of the Waukesha quarry and mill under the Mine Safety Act (J.A. 3a-4a). In

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[3] The Mine Safety Act provides that the Secretary shall issue citations and propose civil penalties for violations of the Act or of any mandatory health and safety standard promulgated under the Act. 30 U.S.C. (Supp. II) 814(a), 820(a). The Secretary's regulations provide for the assessment of a civil penalty for denial of entry. 30 C.F.R. 100.4. When an operator contests a citation, the Act provides for a hearing before an administrative law judge, whose decision is subject to discretionary review by the Federal Mine Safety and Health Review Commission. 30 U.S.C. (Supp. II) 815(d), 823(d). The operator is entitled to review of the final administrative decision as of right in the court of appeals. 30 U.S.C. (Supp. II) 816.

In this case, the Secretary's proposed civil penalty of $1,000 was upheld by an administrative law judge. Waukesha's petition for review of the administrative law judge's decision was granted, and its challenge to the validity of the proposed penalty is currently under submission to the Federal Mine Safety and Health Review Commission. *Waukesha Lime and Stone Co., Inc.* v. *Secretary of Labor*, FMSHRC Docket No. VINC 79-66-PM.

response to the complaint, Waukesha sought an injunction requiring the Secretary to obtain a search warrant prior to inspecting its facility (J.A. 7a-9a).

The district court denied the Secretary's motion for summary judgment and granted summary judgment in favor of Waukesha, holding that Section 103(a) of the Mine Safety Act, 30 U.S.C. (Supp. II) 813(a), is unconstitutional insofar as it authorizes warrantless inspections of stone quarries (J.S. App. 1a-10a).[4] The district court acknowledged that this Court has permitted warrantless searches of commercial establishments in certain regulated industries (J.S. App. 1a, citing *United States* v. *Biswell*, 406 U.S. 311 (1972) (firearms); and *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970) (liquor)), and that several courts of appeals have specifically upheld the constitutionality of warrantless inspections of stone quarries and sand pits pursuant to the Mine Safety Act (J.S. App. 2a-4a). Nevertheless, relying on language in *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978), the district court concluded that warrantless administrative searches are not constitutionally permissible except in industries that have had a long tradition of governmental

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[4] In its initial opinion, the district court cited Section 108 of the Mine Safety Act, 30 U.S.C. (Supp. II) 818, which authorizes the Secretary to seek injunctions to enforce the Act, as the provision it found unconstitutional (J.S. App. 6a). The court thereafter amended its opinion and judgment to reflect the fact that its decision was limited to holding unconstitutional Section 103(a) of the Act, 30 U.S.C. (Supp. II) 813(a), the warrantless inspection provision (J.S. App. 8a-10a; see also *id.* at 11a-12a).

The district court had previously denied the Secretary's and Waukesha's motions for a preliminary injunction (J.S. App. 19a).

regulation (J.S. App. 2a). Because stone quarries were not subjected to extensive federal regulation until 1966, the court ruled that such quarries have not had a sufficiently lengthy regulatory history to justify warrantless inspections under the *Biswell-Colonnade* exception to the Fourth Amendment's warrant requirement (J.S. App. 5a-6a).

SUMMARY OF ARGUMENT

In enacting the Federal Mine Safety and Health Act of 1977, Congress established a comprehensive scheme to regulate health and safety conditions in all of the nation's mines. The Act requires the Secretary of Labor to develop detailed mandatory health and safety standards. In order to ensure compliance with those standards, the Secretary and his representatives are empowered to conduct frequent and regular inspections of all mines and to issue citations for violations of the standards.

Under Section 103(a) of the Mine Safety Act, 30 U.S.C. (Supp. II) 813(a), each underground mine must be inspected no fewer than four times per year and each surface mine must be inspected at least twice per year. In addition, the Secretary is required to conduct follow-up inspections to ensure that previously-cited violations of mandatory health and safety standards have been abated. The language and legislative history of the Act make clear that Congress intended these inspections to be undertaken without a warrant. Section 103(a) grants the Secretary "a right of entry to, upon, or through any coal or other mine" and expressly states that "no advance notice of an inspection shall be provided to any person * * *." The Secretary thus has "a broad right-of-entry * * * to make inspections and investigations of all mines under this Act without first ob-

taining a warrant." S. Rep. No. 95-181, 95th Cong., 1st Sess. 27 (1977).

These warrantless safety and health inspections under the Act are, we submit, reasonable under the Fourth Amendment. The district court held, however, that Section 103(a) of the Act is unconstitutional insofar as it authorizes warrantless searches of stone quarries, because such facilities have not had a long history of governmental regulation. We believe that the decision below rests upon a fundamental misconception of the administrative search exception to the warrant requirement.

The guiding standard of the Fourth Amendment is reasonableness. See *Delaware* v. *Prouse*, 440 U.S. 648, 653-655 (1979); *Camara* v. *Municipal Court*, 387 U.S. 523, 534-539 (1967). Although the Court has stated that warrantless searches are per se unreasonable under the Fourth Amendment, it has recognized certain limited exceptions to the warrant requirement where the public interest has required a more flexible approach. See *Arkansas* v. *Sanders*, 442 U.S. 753, 759 (1979). One such exception concerns inspections of "pervasively regulated industries." This exception was applied to the alcoholic beverage industry in *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970), and was later applied to the firearms industry in *United States* v. *Biswell*, 406 U.S. 311 (1972). In *Biswell*, the Court acknowledged that the firearms industry did not have the same lengthy history of government regulation as did the liquor industry. Nonetheless, the Court applied the exception because of the substantial federal interest in regulating firearms traffic, the importance of inspections to the regulatory scheme, the likelihood that a warrant requirement would frustrate inspec-

tions, and the limited threat posed by inspections to firearms dealers' reasonable privacy expectations.

These factors are all present in this case involving federal inspection of an extremely dangerous and critical industry. First, the federal interest in mine safety and health is considerable. Congress was aware that the mining industry is among the most hazardous in the nation. In the findings and purpose section of the Mine Safety Act, 30 U.S.C. (Supp. II) 801, Congress explained that unsafe and unhealthful conditions in the nation's mines are impediments to the future growth of the mining industry and that both the disruption of production and the loss of income resulting from accidents and diseases unduly burden commerce. Congress also recognized that there is an urgent federal interest in improving working conditions and practices in the mining industry to ensure the adequate production of minerals while at the same time reducing the enormous cost to society caused by mining accidents and debilitating occupational diseases.

Second, the legislative history of the Mine Safety Act is replete with evidence showing that frequent and unannounced inspections are essential to the success of any program designed to provide safer and more healthful working conditions in the mines. The history of the mining industry establishes that regular inspections and the threat of penalties for violations of safety and health standards are absolutely necessary to obtain compliance with the standards. Moreover, given the existence of "reasonable legislative * * * standards for conducting an inspection" (*Camara* v. *Municipal Court*, *supra*, 387 U.S. at 538) and a statutory mandate of frequent and recurring inspections, the imposition of a warrant requirement

each time an inspection must be performed would compel both the Secretary and the courts to engage in an essentially meaningless exercise. Resort to consensual inspections is an unsatisfactory alternative because it would allow the operator to withhold consent to search and then to take temporary cosmetic safety steps, thus giving the operator advance notice of the inspection and thwarting the purpose of the inspection program.

Third, the inspections pose only a minimal threat to a mine operator's reasonable expectations of privacy. A mine "seldom serves as one's" residence or as the repository of personal effects." *Cardwell* v. *Lewis*, 417 U.S. 583, 590 (1974) (plurality opinion). Moreover, Waukesha's mine, like virtually all other mines, is subject to pervasive regulation and inspection by the federal and state governments. Thus, mine operators engaged in this closely regulated and hazardous industry can be presumed to be cognizant of and to have consented to the slight privacy intrusion necessitated by regular health and safety inspections. The Mine Safety Act protects any unusual privacy interests of the mine operator by providing an opportunity to be heard in court if entry is refused and an injunction is sought by the Secretary. In addition, the operator may contest in administrative proceedings and in court any citations issued for violations of mandatory health and safety standards.

Thus, the Mine Safety Act meets the criteria set out by this Court in *Biswell*, because the "regulatory inspections further urgent federal interest and the possibilities of abuse and the threat to privacy are not of impressive dimensions" (406 U.S. at 317). The district court nonetheless concluded that warrantless inspections pursuant to the Act could not

survive scrutiny under this Court's decision in *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978), because stone quarries such as Waukesha's have not had a long tradition of governmental regulation. In *Barlow's*, the Court refused to extend the "pervasively regulated industry" exception to the numerous and diverse industries subject to the Occupational Safety and Health Act of 1970. But nothing in that decision casts doubt on the continuing validity of the administrative search exception or suggests an intent to abandon the holding in *Biswell* that the duration of government regulation is not necessarily dispositive in determining the reasonableness of warrantless inspections of pervasively regulated businesses.

Furthermore, as every court of appeals to consider the question has held, there are significant differences between the statutory scheme in *Barlow's* and the statutory scheme involved in the instant case. The Mine Safety Act, unlike OSHA, applies to a single industry with an acknowledged history of serious accidents and unhealthful working conditions; the inspection provisions of the Mine Safety Act are more narrowly drawn than those of OSHA; and there is less likelihood of the abuse of "unbridled discretion of executive and administrative officers" (436 U.S. at 323) that the Court in *Barlow's* found objectionable. The district court's reliance on *Barlow's* is therefore misplaced.

Finally, it is ironic that the result engendered by the district court's decision—a two tiered program of regulation—is precisely the one rejected by Congress when it enacted the Mine Safety Act. Under the ruling below, coal mines, with their recognized lengthy history of federal regulation, may be inspected without warrants, while the equally hazard-

ous and important noncoal mining industry may be subject to inspection only after search warrants are first obtained. By combining regulation of all mines under a single statute in 1977, Congress intended to avoid such unequal protection of the nation's miners.

ARGUMENT

WARRANTLESS SAFETY AND HEALTH INSPECTIONS OF STONE QUARRIES AND OTHER MINES PURSUANT TO THE MINE SAFETY AND HEALTH ACT OF 1977 ARE REASONABLE UNDER THE FOURTH AMENDMENT

The district court in this case has held unconstitutional an important federal statute that was specifically designed to protect the health and safety of workers in an industry that Congress found to be among the most hazardous in the nation. As we demonstrate, the district court's decision is inconsistent with the established exception to the Fourth Amendment's warrant requirement for inspections of pervasively regulated businesses. The mining industry has a long history of government oversight and is subject to detailed federal regulation; the privacy interests at stake here are minimal and are adequately protected by the statute and implementing regulations; and a warrant requirement would impose a serious burden on the inspection system and would jeopardize enforcement of the health and safety protection scheme enacted by Congress. Moreover, the decision below is not supported by *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978), upon which the district court heavily relied.

A. This Court Has Recognized An Exception To The Warrant Requirement For Regulatory Inspections Of "Pervasively Regulated Industries"

The Fourth Amendment imposes two separate, although related, limitations on searches and seizures. The first clause of the Amendment protects "the basic right to be free from unreasonable searches and seizures," and the second clause requires "that warrants be particular and supported by probable cause." *Payton* v. *New York*, 445 U.S. 573, 584 (1980). See *Arkansas* v. *Sanders*, 442 U.S. 753, 758 (1979); *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 357 (1931). Although the Amendment itself does not suggest the interrelation between the two clauses (see *Ybarra* v. *Illinois*, 444 U.S. 85, 100-101 (1979) (Rehnquist, J., dissenting)), the Court has stated on a number of occasions that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz* v. *United States*, 389 U.S. 347, 357 (1967). See also *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 219 (1973); *United States* v. *United States District Court*, 407 U.S. 297, 314-321 (1972); *Coolidge* v. *New Hampshire*, 403 U.S. 443, 454-455 (1971).

These exceptions "have been established where it was concluded that the public interest required some flexibility in the application of the general rule that a valid warrant is a prerequisite for a search." *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 759. See *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 555 (1976). Accordingly, the Court has recognized an exception to the warrant requirement in cases of government inspections of "pervasively regulated business[es]." *United States* v. *Biswell*, 406 U.S. 311, 316 (1972).

See *Torres* v. *Puerto Rico*, 442 U.S. 465, 473 (1979); *Delaware* v. *Prouse*, 440 U.S. 648, 662 (1979). In *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970), for example, the Court considered the statutory authorization for warrantless inspections of federally licensed dealers in alcoholic beverages. After reviewing the history of federal regulation in the area of alcoholic beverages, the Court concluded that Congress had long exercised control over the liquor industry and "has broad power to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand." 397 U.S. at 76. Hence, the Court unanimously ruled that the Fourth Amendment did not bar warrantless inspections to enforce the liquor laws. However, the Court held that the particular inspection at issue was beyond the scope of the statute because Congress had not expressly authorized forcible entries without a warrant, but instead had made it an offense for a licensee to refuse admission to an inspector. *Id.* at 77.

Thereafter, in *United States* v. *Biswell*, *supra*, the Court upheld the warrantless search provisions of the Gun Control Act of 1968, 18 U.S.C. 923(g), despite the fact that, as the decision explicitly recognized, "[f]ederal regulation of the interstate traffic in firearms is not as deeply rooted in history as is governmental control of the liquor industry * * *." 406 U.S. at 315. The Court found that warrantless inspections pursuant to this statute were reasonable under the Fourth Amendment both because they were essential to effective enforcement of the law and because such inspections posed only a limited interference with the legitimate privacy expectations of firearms dealers. The Court first noted that regulation of firearms traffic was of "central importance to federal efforts to prevent violent crime" and that "inspection

is a crucial part of the regulatory scheme * * *." 406 U.S. at 315. In addition, the Court pointed out that if inspections were to serve as a credible deterrent, they must be frequent and unannounced: "In this context, the prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible." *Id.* at 316. Finally, the Court observed that firearms dealers elect to engage in this pervasively regulated business with the knowledge that their enterprise will be subject to inspection, and that dealers are regularly furnished with information concerning the purposes of the inspector and the limits of his investigative authority. *Ibid.* In light of these considerations, the Court concluded that "where, as here, regulatory inspections further urgent federal interest, and the possibilities of abuse and the threat to privacy are not of impressive dimensions, the inspection may proceed without a warrant where specifically authorized by statute." *Id.* at 317.

As we now show, warrantless safety and health inspections of stone quarries and other mines pursuant to the Mine Safety Act satisfy the standards established in *Biswell* and are therefore reasonable under the Fourth Amendment.

B. Safety And Health Inspections Performed By The Secretary Of Labor Under The Mine Safety Act Meet The Criteria Established In *United States* v. *Biswell* For Valid Warrantless Searches

1. *The Statutory Inspection Scheme Serves Important Governmental Interests*

Because of the dangerous working conditions in the nation's mines, the failure of mine operators to correct hazardous conditions, and the substantial damage to society and to interstate commerce resulting

from mine-related accidents, the federal government has a valid and overriding interest in the health and safety of the nation's miners. "Large interests are at stake, and inspection is a crucial part of the regulatory scheme" (*United States* v. *Biswell*, *supra*, 406 U.S. at 315), because it helps to insure that miners are not exposed to unduly hazardous and unhealthful conditions.

In subjecting the coal mining industry to pervasive regulation, Congress long ago recognized the particular dangers involved in mining. See H.R. Rep. No. 95-312, 95th Cong., 1st Sess. 2 (1977). The health and safety of miners in other extractive industries first came under federal regulation in 1966, with the passage of the Federal Metal and Nonmetallic Mine Safety Act (Metal Act), 30 U.S.C. 721 *et seq.* In its report on the Metal Act, the Senate Committee on Labor and Public Welfare cited a study by the Mine Safety Study Board concerning conditions in the metal and nonmetallic mining industry. The study found that, of 270 workers killed in mining accidents in an 18-month span, approximately half were classified as victims of inadequate supervision or hazardous conditions that were within the power of mine operators to correct, including failure to provide safety devices, defective equipment, roof collapses, and inadequate ventilation. S. Rep. No. 1296, 89th Cong., 2d Sess. 2-3 (1966). In rejecting several amendments to exclude sand, gravel, and crushed stone operations from coverage under the Metal Act, the Committee observed that the available statistics concerning injury frequency and severity "conclusively show that the sand and gravel industry is the most hazardous except for the underground coal and mineral mining industries." *Id.* at 7.

The Mine Safety Act was enacted in 1977, when Congress combined regulation of all mines under one statute and placed inspection control in the hands of the Secretary of Labor. Pub. L. No. 95-164, 91 Stat. 1290 *et seq.* This enactment repealed the Metal Act and amended the Federal Coal Mine Health and Safety Act of 1969 (Coal Act), 30 U.S.C. 801 *et seq.*, to include mines previously covered under the Metal Act.[5]

The extent of federal regulation under the Mine Safety Act is far-reaching and pervasive. The Secretary of Labor is directed to develop detailed mandatory safety and health standards for all mines for the protection of life and prevention of injuries. 30 U.S.C. (Supp. II) 811. Representatives of the Secretary are empowered and required to inspect all mines frequently in order to obtain and disseminate safety and health information, investigate accidents, and monitor compliance with safety and health standards (30 U.S.C. (Supp. II) 813); to issue and enforce citations for failure to follow safety and health standards (30 U.S.C. (Supp. II) 814); and to order that all miners be withdrawn immediately from affected

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[5] The Mine Safety Act defines "coal or other mine" to include "an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground." 30 U.S.C. (Supp. II) 802(h)(1). The definition also includes property used in the milling of minerals or in the preparation of coal or other minerals. Both the Metal Act and the Coal Act contained right of entry inspection provisions virtually identical to Section 103(a) of the Mine Safety Act. See 30 U.S.C. 724; 30 U.S.C. 813(b)(1). Both Acts also had injunctive procedures quite similar to Section 108(a) of the Mine Safety Act, 30 U.S.C. (Supp. II) 818(a). See 30 U.S.C. 733(a); 30 U.S.C. 818.

areas when imminently dangerous conditions are found to exist. 30 U.S.C. (Supp. II) 817.

Congress enacted the Mine Safety Act because of its concern that previous legislation had not provided sufficient protection to miners. In its report recommending passage of the Act, the Senate Committee listed several mining accidents in recent years that had taken the lives of 260 people, and noted that:

> [D]espite * * * considerable Congressional attention, our nation still experiences deaths and serious injuries in our mines at a rate which casts shame on an advanced, industrialized society. Every working day of the year, at least one miner is killed and sixty-six miners suffer disabling injuries in our nation's mines.

S. Rep. No. 95-181, 95th Cong., 1st Sess. 4 (1977). Similarly, the House Report on the Act observed that, according to the National Safety Council, the death rate for mining in 1975 was four times as great as the average for all industries; the Council ranked mining as "the most hazardous of the eight major industry groupings." H.R. Rep. No. 95-312, *supra*, at 3. The House Report further noted that since 1958, a total of 7,640 miners had been killed on the job, 4,471 in coal mines and 3,269 in metal and nonmetal mines. *Id.* at 2.[6]

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[6] The Committee reports described various disasters that had occurred in both coal and noncoal mines in recent years and that had resulted in large numbers of fatalities. H.R. Rep. No. 95-312, *supra*, at 4-6; S. Rep. No. 95-181, *supra* at 4. Furthermore, the House Report reviewed in considerable detail the numerous occupational diseases and health hazards specifically associated with noncoal mining. H.R. Rep. No. 95-312, *supra*, at 10-13.

In recognition of the dangerous and unhealthful conditions in the nation's mines, Congress noted in the Act's statement of purpose that there was an urgent need to improve mine working conditions and to alleviate the disruptive effects of accidents on miners, their families, and the nation's commerce. 30 U.S.C. (Supp. II) 801. The Senate Report stressed the importance of improving mine safety in order to "encourage young people to go into the occupation of mining as the need of our nation for the minerals and energy sources extracted from the earth continues to increase." S. Rep. No. 95-181, *supra*, at 8.

Congress targeted mining for strict regulation because it concluded that mining operations are "so unique, so complex, and so hazardous as to not fit neatly under the Occupational Safety and Health Act. A miner's chances of getting killed on the job are more than eight times as great as those of a laborer in manufacturing * * *." H.R. Rep. No. 95-312, *supra*, at 1.[7] The debates on the Mine Safety Act reflect a firm desire on the part of Congress to keep the Act's regulatory program completely separate from the more general regulatory scheme ad-

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[7] The Senate Committee reported that:

> [F]atalities and disabling injuries in our nation's mines are still unacceptably and unconscionably high. According to the 1974 Annual Report on Occupational Safety and Health, the incidence of work related injuries and illnesses for miners exceeded the "all-industry" rate by about 14 percent. * * * According to the Report, "about one out of every 1500 mine workers * * * was killed on the job or died from work related injuries or illnesses in 1973, compared with one out of every * * * 12,400 for all workers covered by OSHA."

S. Rep. No. 95-181, *supra*, at 7.

ministered under OSHA. Several members of Congress emphasized that although responsibility for mine safety and health was to be transferred from the Department of the Interior to the Department of Labor, the mine program was to be administered by an entirely different unit than the OSHA program. See 123 Cong. Rec. 19952 (1977) (remarks of Sen. Williams); *id.* at 20050 (remarks of Sen. Williams); *id.* at 22981 (remarks of Rep. Oberstar); *id.* at 23182 (remarks of Rep. Gaydos).

Finally, one of the principal congressional concerns in enacting the Mine Safety Act was to ensure equal treatment of all classes of miners by combining regulation of coal and noncoal mines into one comprehensive statute.[8] See H.R. Rep. No. 95-312, *supra*, at 3-9. The Senate Report concluded: "[I]t is essential that there be a common regulatory program for all operators and equal protection under the law for all miners." S. Rep. No. 95-181, *supra*, at 13. One reason for this view was that stricter regulation under the prior Coal Act had proved more effective in reducing fatalities and serious injuries than had the less stringent protections provided by the Metal Act. See 123 Cong. Rec. 4397 (1977) (remarks of Sen. Church) *id.* at 19927-19928 (remarks of Sen. Javits); *id.* at 19932 (remarks of Sen. Randolph). Another reason was that a single oversight program could be more efficiently administered. See *id.* at 23159-23160 (remarks of Rep. Le Fante).

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[8] The district court's ruling frustrates this goal. Under the court's holding, coal mines, which have had an acknowledged long history of regulation, may be inspected without a warrant whereas noncoal mines may be inspected only pursuant to a warrant.

Clearly, the federal government has a substantial interest in safety and health conditions in both coal and noncoal mines.[9] The comprehensive nature of the Mine Safety Act's regulatory scheme evidences Congress' recognition of this fact. Congress properly concluded that a pervasive and uniform regulatory program is essential to protect that important federal interest.

2. *Warrantless Searches are Essential to Effective Implementation of the Regulatory Program*

Here, as in *Biswell*, warrantless inspections are essential "if the law is to be properly enforced and inspection made effective * * *." *United States* v. *Biswell, supra*, 406 U.S. at 316. Congress determined that frequent, unannounced, on-site inspections are

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[9] Recent statistics underscore the fact that noncoal mining operations such as Waukesha's stone quarry and mill are extremely hazardous. For example, in 1979 (the latest year for which complete data are available), the fatality rate at surface stone mines such as Waukesha's was three and one-half times that at surface coal mines, and the disabling injury rate was one and one-half times as high. The total injury rate was one and one-third times that at surface coal mines. Similar differences in fatality and injury rates existed in 1978. Stone processing plants are nearly as dangerous as stone mines and had accident frequency rates only slightly lower than those at coal processing plants for these two years. These comparisons were derived from the following official government publications prepared by the Mine Safety and Health Administration of the Department of Labor, *Informational Report IR 1112, Injury Experience in Coal Mining, 1978*, Table 2, at 13 (1979); *IR 1122, Injury Experience in Coal Mining, 1979*, Table 2, at 13 (1980); *IR 1113, Injury Experience in Stone Mining, 1978*, Table 2, at 11 (1979); *IR 1123, Injury Experience in Stone Mining, 1979*, Table 2, at 11 (1980).

necessary in order to enforce compliance with the safety and health standards to be developed by the Secretary of Labor.[10] Under Section 103(a) of the Mine Safety Act, each underground mine in the nation is to be inspected in its entirety at least four times annually, and all surface mines, including stone quarries such as Waukesha's, must be inspected at least twice annually. Section 103(a) of the Act also requires the Secretary to perform follow-up inspections to determine whether the mine operator has complied with citations directing the abatement of previously discovered violations of mandatory health and safety standards. 30 U.S.C. (Supp. II) U.S.C. 813(a).[11] In Section 108(a)(1)(C) and (D) of the Act, 30 U.S.C. (Supp. II) 818(a)(1)(C) and (D), Congress included specific provisions authorizing the Secretary to institute an action for injunctive relief to compel an operator to permit the Secretary's representative to enter the mine for the purpose of conducting an inspection. Inclusion of these provisions in the Act reflects Congress' determination that inspections

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[10] As Senator Williams, the primary sponsor of the Act, remarked: "If we are to have standards applicable to these mines, we must with regularity and frequency inspect all mines to make sure that these standards are being met." 123 Cong. Rec. 4[illegible]38 (1977).

[11] In addition, for mines that liberate excessive amounts of explosive gases, the Secretary is required to inspect once every five, ten, or fifteen days at irregular intervals. 30 U.S.C. (Supp. II) 813(i). In fiscal year 1979, the latest complete year for which statistics are available, there were 20,061 mines subject to the Mine Safety Act. Of those, 206 are considered gassy and, therefore, are subject to particularly frequent inspections. In fiscal year 1979, there were 1,978 federal inspection personnel, who performed 114,032 inspections and investigations.

are a crucial part of the regulatory scheme. Cf. *Marshall* v. *Gibson's Products, Inc.*, 584 F.2d 668, 674-675 (5th Cir. 1978).

Congress left no doubt that these inspections are to be accomplished without the use of a warrant. Section 103(a) of the Act absolutely prohibits the giving of advance notice of inspections to determine whether an imminent danger exists or whether the facility is in compliance with the mandatory health and safety standards of the Act.[12] Moreover, Section 103(a) provides that the Secretary's representative "shall have a right of entry to, upon, or through any coal or other mine" for the purpose of conducting an inspection under the Act. The Senate Report explicitly stated Congress' intention "to grant a broad right-of-entry to the Secretaries or their authorized representatives to make inspections and investigations of all mines under this Act *without first obtaining a warrant.*" S. Rep. No. 95-181, *supra*, at 27 (emphasis added).[13]

Congress has thus instituted an extensive warrantless inspection program to protect against mine hazards and disasters. As Congress correctly recognized, a warrant requirement would seriously under-

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[12] On the other hand, the advance notice prohibition does not apply to inspections for the purposes of obtaining and disseminating information relating to health and safety conditions or of gathering information with respect to mandatory health or safety standards.

[13] The Senate Report noted with approval the decision in *Youghiogheny & Ohio Coal Co.* v. *Morton*, 364 F. Supp. 45 (S.D. Ohio 1973) (three-judge court), which upheld the constitutionality of warrantless inspections under the Coal Act (30 U.S.C. 813(a), (b)). S. Rep. No. 95-181, *supra*, at 27.

mine the ability of the Secretary to carry out his responsibilities under the Mine Safety Act.

To begin with, the imposition of a warrant requirement would serve little purpose beyond requiring the Secretary and the federal courts to engage in a meaningless exercise each time an inspection must be conducted. The Mine Safety Act itself contains a mandatory inspection scheme that meets the requirements of probable cause for an administrative search. It is settled that, in the administrative search context,

> probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]."

Marshall v. *Barlow's, Inc., supra,* 436 U.S. at 320, quoting *Camara* v. *Municipal Court,* 387 U.S. 523, 538 (1967) (footnote omitted). Because Congress in the Mine Safety Act has established reasonable standards containing specific neutral criteria for conducting safety and health inspections of mines, the imposition of a warrant requirement would offer little more protection for mine operators than the Act already provides. As noted earlier (page 25 and note 11), under the Act the Secretary is required to inspect all surface mines twice annually, all underground mines four times annually, and all "gassy" mines at irregular five, ten, or fifteen-day intervals. In addition, he must perform follow-up inspections to determine if violations have been abated.[14]

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[14] Under Section 103(g) of the Act, 30 U.S.C. (Supp. II) 813(g), the Secretary is also required to conduct an immediate inspection of a mine after receiving notification from a

In these circumstances, the process of obtaining a warrant would be reduced to a series of mechanical gestures. Inspections would take place in the same fashion, except for the delay caused by drafting the necessary boilerplate affidavits and presenting them to a magistrate. As a result, the Secretary, the United States Attorneys (see 30 U.S.C. (Supp. II) 822) and the federal courts would be overburdened, and the purpose of the Mine Safety Act—the protection of miners—would be frustrated by the huge volume of paperwork generated in order to obtain warrants authorizing the more than 100,000 mine inspections performed annually (see note 11, *supra*).

On the other hand, if the Secretary initially seeks to inspect with the consent of the mine operator, the operator could simply refuse entry until a warrant is obtained in order to take cosmetic safety steps before the inspector returns, and could then revert to unsafe practices after the inspector departs. Congress was well aware of this possibility and therefore mandated that all mines be subject to unannounced inspections. The Senate Report explained:

> [I]n view of the notorious ease with which many safety or health hazards may be concealed if advance warning of inspection is obtained, a warrant requirement would seriously undercut this Act's objectives.
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> The Committee has specifically adopted the prohibition on advance notice of inspections which

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miner or a miner's representative that a violation of the Act or of a mandatory health or safety standard exists, or that an imminent danger exists. The operator is to be notified "forthwith" if the complaint reports the existence of an imminently dangerous condition.

> is currently the rule under the Coal Act, and rejects the provision of the Metal Act which permits such advance notice.

S. Rep. No. 95-181, *supra*, at 27. The problems associated with the giving of advance notice are illustrated by the results of an investigation following the Scotia mine disaster, which took the lives of 23 miners and three federal inspectors in March 1976. The investigation revealed that explosions in the mine were caused in part by the movement of brattices contrary to the safety code after inspectors had left, resulting in inadequate ventilation. See 123 Cong. Rec. 19942 (1977) (remarks of Sen. Williams).[15]

It is thus apparent that either alternative to warrantless inspections—*i.e.*, the use of a warrant in every case, or the obtaining of a warrant when an operator refuses to admit an inspector who arrives at an inopportune time—would seriously impede the Act's enforcement program. Here, as in *Biswell*, "if inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections

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[15] The Department of Labor has found that advance notice has caused serious problems for OSHA inspections. It allows employers to shut down equipment before an inspection, and this is "particularly destructive to industrial hygiene inspections because dust and fumes can be manipulated by temporary reductions in production." 45 Fed. Reg. 65918 (1980). Advance notice also permits "temporary clean-ups, temporary repairs, modification of operations and sanitation of work areas by interim measures that temporarily disguise the true extent of an existing hazard." *Ibid.* Compare, *e.g.*, *See* v. *City of Seattle*, 387 U.S. 541 (1967), where "the mission of the inspection system was to discover and correct violations of the building code, conditions that were relatively difficult to conceal or correct in a short time." *United States* v. *Biswell, supra*, 406 U.S. at 316.

are essential. In this context, the prerequisite of a warrant could easily frustrate inspection" (406 U.S. at 316).

3. *The Mine Safety Act Provides Adequate Protections for the Privacy Interests of Mine Operators*

Warrantless inspections under the Mine Safety Act pose only a minimal threat to any reasonable expectations of privacy that mine operators may have. The Act has built-in protections to insure that the power of warrantless entry will not be abused, and the occurrence and frequency of inspections are not left entirely to the unfettered discretion of inspectors in the field. See *Marshall* v. *Barlow's, Inc.*, *supra*, 436 U.S. at 323; cf. *Delaware* v. *Prouse*, *supra*, 440 U.S. at 661.

As we have already explained (pages 24-30, *supra*,) Congress has mandated that regular inspections be conducted as a critical part of the safety and health standards enforcement mechanism and has specified the minimum number of annual inspections. 30 U.S.C. (Supp. II) 813(a). In addition, operators of mines must be familiar with the safety and health standards of the Mine Safety Act (see 30 U.S.C. (Supp. II) 811(e)) and thus are presumed to have full knowledge of the inspector's task and his authority to inspect. These factors were relied on by this Court in *Biswell* in upholding a warrantless search (406 U.S. at 316), and they also led the three-judge court in *Youghiogheny & Ohio Coal Co.* v. *Morton*, 364 F. Supp. 45, 51 (S.D. Ohio 1973), to hold that warrantless inspections under the Coal Act were reasonable. The inspections conducted under the Mine Safety Act are thus materially different from those disallowed in *Camara* v. *Municipal Court*, *supra*, and *See* v. *City of Seattle*, 387 U.S. 541 (1967). In those

cases, the Court found that the occupant of a home or owner of a commercial building had no way of knowing whether enforcement of a municipal code required inspection of his premises, whether inspectors were authorized to search, or whether the search exceeded the limits of the inspection powers. See *Marshall* v. *Barlow's, Inc.*, *supra*, 436 U.S. at 323-324.

Furthermore, as a general matter, any expectations of privacy enjoyed by operators of quarry and mill facilities such as Waukesha's are not likely to be substantial. A mine "seldom serves as one's residence or as the repository of personal effects." *Cardwell* v. *Lewis*, 417 U.S. 583, 590 (1974) (plurality opinion). See also *South Dakota* v. *Opperman*, 428 U.S. 364, 367-368 (1976). Compare *Mancusi* v. *DeForte*, 392 U.S. 364, 367-370 (1968). Indeed, as indicated above (pages 5-6, *supra*), Waukesha allows inspections of its operation by a variety of outsiders, including labor union and insurance carrier representatives, and it does not restrict public access to many of the places the Secretary sought to inspect (J.A. 26a-27a). More important, Waukesha is regularly inspected by mine safety engineers from the Wisconsin Department of Industry, Labor and Human Relations who do not obtain warrants and who are not restricted in their access to any area of the operation (J.A. 28a).[16] The state inspectors monitor compliance with Wisconsin mine safety codes and issue citations for violations. In fact, in the most recent state inspection noted in

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[16] See *United States ex rel. Terraciano* v. *Montanye*, 493 F.2d 682 (2d Cir.), cert. denied, 419 U.S. 875 (1974), where the court found that a warrantless search of pharmaceutical records pursuant to pervasive state regulation did not violate the Fourth Amendment.

the record, Waukesha was cited for six violations in the dust house, the same area federal inspector Brey was checking when he was asked to leave (J.A. 28a-29a).

In addition, certain areas of mines such as Waukesha's are subject to warrantless inspections under a wholly separate federal statute. As a "permittee" engaged in the lawful use of explosives, Waukesha's storage facilities for explosives may be inspected without a warrant by representatives of the Secretary of the Treasury under the Organized Crime Control Act of 1970, 18 U.S.C. 843(f).[17] Pursuant to an agreement between the Department of the Treasury and the Department of Labor, inspections for explosives at mining facilities under this statute are now conducted by representatives from the Mine Safety and Health Administration. See 45 Fed. Reg. 25564 (1980).[18]

If a mine operator does have special privacy interests it believes should be protected, the Mine Safety Act already provides an effective means for protecting them. The Act prohibits forcible entries and thus affords an operator an opportunity to obtain immediate judicial review of any special privacy claims it wishes to assert. See *Marshall* v. *Texoline Co.*, 612 F.2d 935, 937-938 (5th Cir. 1980); *Marshall* v. *Stoudt's Ferry Preparation Co.*, 602 F.2d 589, 594 (3d Cir. 1979), cert. denied, 444 U.S. 1015 (1980).

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[17] The warrantless search provisions of this statute were patterned after the statute that authorized the warrantless inspection in *Biswell*. See H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. 67 (1970).

[18] The record reflects that Waukesha's facility has been inspected by agents of the Department of the Treasury (J.A. 27a).

When an operator refuses to allow an inspection, the Secretary is authorized by 30 U.S.C. (Supp. II) 818 (a)(1) to file a civil action in federal district court to enjoin future denials of entry, as was done in the instant case. The district court in issuing the injunction may take steps to accommodate any unusual privacy expectations asserted by the mine operator. In *Marshall* v. *Stoudt's Ferry Preparation Co.*, *supra*, 602 F.2d at 594, for example, the district court imposed on the federal inspectors a confidentiality requirement in order to protect the mine operator's trade secrets.

In contrast to the injunction procedure under the Act, imposition of a warrant requirement would not provide any significant protection to those mine operators who might wish to assert unusual privacy claims. This is so both because a warrant may be obtained ex parte, without any opportunity for the mine operator to interpose particular objections prior to the search, and also because administrative search warrants need not be based on a specific showing of a violation but may issue on the ground that reasonable legislative or administrative standards have been satisfied (see page 27, *supra*).

In short, in this situation as in *Biswell*, "if the necessary flexibility as to time, scope and frequency is to be preserved, the protections afforded by a warrant would be negligible." 406 U.S. at 316. Hence, adding a warrant requirement would gain the operators little, but would seriously impede enforcement of the Mine Safety Act.

C. *Marshall* v. *Barlow's, Inc.* Does Not Control This Case Because The Inspection Scheme Under The Mine Safety Act Is Substantially Different From the Occupational Safety and Health Act Inspection Program At Issue In *Barlow's*

Although the district court recognized that warrantless searches of business premises are constitutionally permissible in certain circumstances, it concluded, in reliance on language in *Marshall* v. *Barlow's, Inc.*, *supra*, that the administrative search exception to the warrant requirement is applicable only in those industries with a long tradition of governmental regulation. This conclusion is based on a misreading of this Court's decision in *Barlow's*. In fact, *Barlow's* reaffirmed the holding of *Biswell* that a warrant is not required for inspections of "pervasively regulated businesses." Subsequent to *Barlow's*, the courts of appeals have consistently held this exception applicable to noncoal mining operations such as Waukesha's.

Barlow's involved the constitutionality of warrantless searches under Section 8(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 657(a). While it is true, as the district court noted (J.S. App. 2a), that the Court in *Barlow's* referred to a "long tradition of close government supervision" (436 U.S. at 313) as one factor distinguishing between enterprises that may be inspected without a warrant and those that may not, this statement was not intended to be exhaustive. Rather, the Court also expressly reaffirmed the exception to the warrant requirement for statutorily authorized warrantless searches of "pervasively regulated businesses" typified by *Biswell* (firearms), and explained that "businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their

trade * * *. The businessman in a regulated industry in effect consents to the restrictions placed upon him." *Marshall* v. *Barlow's, Inc., supra,* 436 U.S. at 313, quoting from *Almeida-Sanchez* v. *United States,* 413 U.S. 266, 271 (1973).[19] In view of the fact that *Biswell* upheld warrantless searches in an industry that had not had a lengthy history of governmental regulation and that the decision in *Biswell* was cited approvingly in *Barlow's,* it is clear that the district court erred in concluding that warrantless inspections of stone quarries under the Mine Safety Act could not be sustained merely because quarries have not had a long tradition of federal regulation.

Moreover, although *Barlow's* refused to extend the exception for pervasively regulated businesses to all industries covered by the Occupational Safety and Health Act, the Court emphasized that its decision was limited to OSHA searches and that the reasonableness of warrantless inspections under other regulatory statutes would "depend upon the specific enforcement needs and privacy guarantees of each statute" (436 U.S. at 321). In particular, the Court recognized that "[s]ome * * * statutes * * * apply only to a single industry, where regulations might already be so pervasive that a *Colonnade-Biswell* exception to the warrant requirement could apply" (436 U.S. at 321). The Court specifically cited the predecessor statutes of the Mine Safety Act as examples of regulatory schemes that were sufficiently distinguishable from OSHA that their constitutional valid-

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[19] As the Court similarly observed in *Delaware* v. *Prouse, supra,* 440 U.S. at 662, "[t]here are certain relatively 'unique circumstances' * * * in which consent to regulatory restrictions is presumptively concurrent with participation in the regulated enterprise."

ity would not be placed in question by the holding in *Barlow's* (436 U.S. at 321-322 n.18).

Three courts of appeals have examined the enforcement needs and privacy protections of the Mine Safety Act in light of *Barlow's* and have concluded, contrary to the district court in this case, that warrantless searches of stone quarries or similar facilities are not unreasonable under the Fourth Amendment. See *Marshall* v. *Texoline Co., supra; Marshall* v. *Nolichukey Sand Co., Inc.*, 606 F.2d 693 (6th Cir. 1979), cert. denied, 446 U.S. 908 (1980); *Marshall* v. *Stoudt's Ferry Preparation Co., supra.* See also *Marshall* v. *Cedar Lake Sand and Gravel Co.*, 480 F. Supp. 171 (E.D. Wis. 1979); *Marshall* v. *Donofrio*, 465 F. Supp. 838 (E.D. Pa. 1978), aff'd, 605 F.2d 1196 (3d Cir. 1979) (table), cert. denied, 444 U.S. 1102 (1980). In addition, the Fourth Circuit has permitted warrantless searches of an owner-operated coal mine. *Marshall* v. *Sink*, 614 F.2d 37 (1980).[20]

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[20] Prior to *Barlow's*, in *Youghiogheny & Ohio Coal Co.* v. *Morton, supra*, a three-judge court upheld warrantless searches of coal mines pursuant to the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 *et seq.*

We note that the Ninth Circuit recently held, in *Marshall* v. *Wait*, 628 F.2d 1255 (1980), that a small, decorative rock quarry, family owned and operated since the turn of the century, could not constitutionally be subjected to warrantless inspections under the Mine Safety Act. In the special circumstances of that case, the court concluded that the owners had not impliedly consented to warrantless governmental intrusions (*id.* at 1259). The court explicitly declined to rule on the facial constitutionality of the Act's inspection provision (*id.* at 1258).

The question presented in this case is also raised in two appeals now pending before the Tenth Circuit. *Marshall* v. *Wallach Concrete Products, Inc.*, No. 80-1334; *Marshall* v. *Rose Gravel Co.*, No. 80-1027. In addition, there are at least

These courts have recognized that there are significant differences between the statutory scheme reviewed in *Barlow's* and the scheme established in the Mine Safety Act. See *Marshall* v. *Texoline Co.*, *supra*, 612 F.2d at 937; *Marshall* v. *Nolichuckey Sand Co., Inc.*, *supra*, 606 F.2d at 695-696; *Marshall* v. *Stoudt's Ferry Preparation Co.*, *supra*, 602 F.2d at 594; see also *Marshall* v. *Sink*, *supra*, 614 F.2d at 38-39.

OSHA authorizes representatives of the Secretary of Labor to search any establishment that is engaged in a business affecting interstate commerce and that has employees. 29 U.S.C. 657(a), 652(5). The representatives may enter any areas of the establishment where work is performed by an employee and may inspect all pertinent conditions, structures, equipment, and materials. 29 U.S.C. 657(a)(1), (2). As the court noted in *Marshall* v. *Nolichuckey Sand Co. Inc.*, *supra*, 606 F.2d at 696, "[a]pproval of warrantless inspections in such an 'across the board' manner would have eviscerated the holding in *See* v. *Seattle* and would have turned the exception into the rule." See *Marshall* v. *Barlow's, Inc.*, *supra*, 436 U.S. at 313. In contrast to OSHA, the Mine Safety Act covers a single industry with an acknowledged history of serious accidents and unhealthful working conditions.

Moreover, the Court in *Barlow's* declined to uphold warrantless inspections in the OSHA context because

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two appeals pending concerning warrantless inspections under the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq. Andrus* v. *P-Burg Coal Co., Inc.*, No. 80-1916 (7th Cir.); *United States* v. *White*, No. 79-5386 (6th Cir.). These cases involve inspections of surface coal mining operations to enforce codes designed to prevent injury to the environment and the public health and safety.

the result would have been to "devolve[] almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search." *Marshall* v. *Barlow's, Inc., supra*, 436 U.S. at 323. The Occupational Safety and Health Act does not provide any standards to guide inspectors either in their selection of establishments to be searched or in the exercise of their authority to search, other than to require that the inspections be performed "during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner * * *." 29 U.S.C. 657 (a)(2). In addition, although the Secretary is authorized to promulgate health and safety standards under OSHA (29 U.S.C. 655), that statute also contains a "general duty" clause (29 U.S.C. 654(a)(1)), which can give rise to a citation even though no specific health or safety standard has been violated.[21] By comparison, the Mine Safety Act requires that *all* mines be inspected on a regular basis, and sets a minimum number of annual inspections. The Act places limitations on the purposes for which searches may be conducted and also limits the situations in which no notice is required. See *Marshall* v. *Texoline Co., supra*, 612 F.2d at 937.[22] Unlike OSHA, the Mine Safety Act contains no "general duty" clause authorizing

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[21] 29 U.S.C. 654(a)(1) provides:

Each employer—

> (1) shall furnish to his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

[22] The Act also grants the mine operator a right to accompany the Secretary's representative during his inspection of the mine. 30 U.S.C. (Supp. II) 813(f).

the Secretary to issue a citation even where a specific standard has not been violated.[23] In order to cite an employer under the Mine Safety Act, the Secretary must allege a violation of a particular standard. Those standards are all contained in the Act or in Title 30 of the Code of Federal Regulations. Thus, by providing in the Mine Safety Act specific limitations on the Secretary's inspection authority, Congress has "minimize[d] the risk of unreasonable assertions of executive authority." *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 759.

Furthermore, in the OSHA context, a search warrant performs the valuable functions of assuring the business owner that the inspection is authorized by law and advising "the owner of the scope and objects of the search, beyond which limits the inspector is not expected to proceed." *Marshall* v. *Barlow's, Inc.*, *supra*, 436 U.S. at 323; see *Camara* v. *Municipal Court*, *supra*, 387 U.S. at 532. As the Court observed in *Barlow's*, "[a] warrant * * * would provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria." 436 U.S. at 323. Mine operators, on the other hand, are well aware of the Secretary's authority to conduct regular inspections of all mine facilities with a specified frequency, and they are also required to be familiar with the safety and health standards promulgated pursuant to the Mine Safety Act. 30 U.S.C. (Supp. II) 811(e). Accordingly, a warrant is not necessary to serve these purposes in connection with inspections of mines.

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[23] Congress specifically rejected the idea of including a "general duty" clause in the Mine Safety Act. S. Conf. Rep. No. 95-461, 95th Cong., 1st Sess. 38-39 (1977).

Finally, unlike OSHA, the provisions of the Mine Safety Act expressly "envision resort to federal-court enforcement when entry is refused * * *." *Marshall* v. *Barlow's Inc.*, *supra*, 436 U.S. at 321. Because the statutory scheme requires the government to obtain judicial authorization before an inspection is forced upon an unwilling party, the Act provides safeguards roughly equivalent to those contained in traditional search warrants. See *United States* v. *Mississippi Power & Light Co.*, No. 79-2636 (5th Cir. Mar. 6, 1981), slip op. 4296.[24]

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[24] In addition, under the Secretary's regulations (30 C.F.R. 100.4) an operator may be subject to a civil penalty for denying entry to an inspector seeking to conduct a search pursuant to the Mine Safety Act. The opinion of the district court denying the government's motion to amend the judgment (J.A. App. 11a-12a) clearly indicates that the judgment below is not based on the court's discussion, in its decision granting summary judgment for appellees (J.S. App. 5a), regarding the civil penalty provision of the Act, 30 U.S.C. (Supp. II) 820(a). There is, in any event, nothing in this provision to cast doubt on the validity of the Act. Under the Act, any penalty assessed by the Secretary is reviewable by an administrative law judge, by the Federal Mine Safety and Health Review Commission, and by a federal court of appeals. 30 U.S.C. (Supp. II) 815(d), 823(d)(1), (2)(A), and 816. This scheme affords adequate protection against a wrongly assesssed penalty. As noted earlier (see note 3, *supra*), Waukesha's challenge to the penalty assessed in this case is currently pending before the Mine Safety and Health Review Commission.

Furthermore, the district court erred in concluding (J.S. App. 5a) that imposition of a penalty for frustrating a safety and health inspection "does not present a fair means for protecting privacy interests." In *Colonnade Catering Corp.* v. *United States*, *supra*, the Court noted that Congress had selected a standard for inspections that did not permit forcible, warrantless entries, but instead made it an offense, punishable by a mandatory $500 fine, for a liquor licensee to refuse admission to the inspector. 397 U.S. at 74, 77. The civil penalty provision of the Mine Safety Act similarly protects

In light of these major differences between OSHA and the Mine Safety Act, the district court's reliance on *Barlow's* was clearly misplaced. As noted above, because *Barlow's* did not extinguish but rather reaffirmed the exception recognized in *Biswell* for inspections of pervasively regulated businesses, the court below erred in focusing solely on the length of federal regulation of the stone quarry industry.

In our view, length of regulation is neither a necessary nor a sufficient reason to justify warrantless inspections under the administrative search exception. Rather, the dispositive factors in this context are the importance of the federal interests involved, the pervasive nature of the regulatory scheme at issue, the necessity for dispensing with the warrant requirement, the reasonable privacy expectations of the regulated industry, and the extent to which the statutory scheme protects those privacy interests. Length of regulation is no doubt of some significance, but only because it may indicate that Congress has consistently perceived that a particular regulatory program is important or that an employer in a particular industry cannot reasonably harbor certain expectations of privacy from government inspection. But merely because Congress has regulated in one area, even for a long period of time, does not neces-

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the security and privacy of mine operators by precluding government inspectors from making forcible entries without a warrant. Without such a penalty, mine owners would have no incentive to permit inspections without forcing the Secretary to obtain an injunction when inspecting each mine for the first time. Moreover, assessment of a $1,000 penalty, as in the present case, does not rise to the level of a penalty so "great that non-compliance and a judicial challenge cannot be risked." See *Brown & Williamson Tobacco Corp.* v. *Engman*, 527 F.2d 1115, 1119 (2d Cir. 1975), cert. denied, 426 U.S. 911 (1976).

sarily mean that regulation in other areas may be enforced by warrantless searches. Thus, in *Barlow's*, this Court rejected the argument that "the imposition of minimum wages and maximum hours on employers who contracted with the Government under the Walsh-Healey Act prepared the entirety of American interstate commerce for regulation of working conditions to the minutest detail." 436 U.S. at 314. By the same token, the fact that pervasive regulation by the federal government is of relatively recent vintage, while entitled to some consideration in weighing the factors mentioned above, cannot be conclusive.[25]

In any event, we note that in Wisconsin stone quarries such as Waukesha's have been subject to warrantless inspection by state officials since about 1922,[26] by federal mine inspectors since 1966 and by federal explosives inspectors since 1970. In these circumstances, we doubt that it could seriously be argued that Waukesha's management, which obtained

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[25] For example, few people would question the federal government's legitimate interest in pervasively regulating the nuclear power industry or its compelling need to conduct routine safety inspections of facilities in that new industry. See 42 U.S.C. 5846(d); 10 C.F.R. 19.14.

[26] Most other states have also had substantial involvement in regulating the noncoal mining industry. A study submitted to Congress in 1965 by the Secretary of the Interior noted that 45 states and Puerto Rico had provided for safety regulation of the mineral mine industry. Of these states, 33 specifically required the inspection of all mines, the laws were not specific as to inspection in five states, and in seven states inspections were limited to mines producing only certain commodities or employing a specified minimum number of workers. In most states, the intervals between inspections ranged from one to twelve months. 1 *Health and Safety Study of Metal and Nonmetal Mines, A Report to the Congress By the Secretary of the Interior in Response to Pub. L. No. 87-300, 75 Stat. 649*, at 50-52 (1965).

control of the mine in May 1967 (J.A. 26a), has not in effect consented to the interference with privacy interests imposed by warrantless inspections under the Mine Safety Act. In contrast, the Court in *Barlow's* refused to infer voluntary consent to searches from "the single fact that one conducts a business affecting interstate commerce * * *." 436 U.S. at 314.

In sum, given the overwhelming governmental interest in protecting the lives and health of mine workers, the need for frequent, unannounced inspections of mines to accomplish the statutory purpose, the minimal threat to the privacy interests of mine operators, and the slight additional benefit to those privacy interests that a warrant requirement would provide, we submit that warrantless inspections pursuant to the Mine Safety Act are reasonable under the Fourth Amendment.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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MARCH 1981

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 339711 266

No. 80-901

MAY 9 1981
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, APPELLANT

v.

DOUGLAS DEWEY AND WAUKESHA LIME AND
STONE COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

MOTION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM AND SUPPLEMENTAL MEMORANDUM FOR THE APPELLANT

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The Court heard oral argument in this case on April 28, 1981. On the same day, the United States District Court for the Eastern District of Wisconsin issued a decision (App., *infra*) upholding the constitutionality of the warrantless inspection provisions of the Federal Mine Safety and Health Act of 1977.

Pursuant to Rule 35.5 of the Rules of this Court, the Secretary of Labor moves for leave to file this supplemental memorandum to bring this recent decision to the Court's attention.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

MAY 1981

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

RAY MARSHALL, Secretary of Labor, United States Department of Labor,

Plaintiff,

v.

HALQUIST STONE COMPANY, INC., t/a/d/b/a Halquist Stone Company, Inc., Lannon Quarry and Mill,

Defendants.

DECISION AND ORDER

Civil Action
No. 78-C-463

FILED
APR 28 1981
Clerk

This is an action brought by the Secretary of Labor under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., to permanently enjoin the defendant Halquist Stone Company, Inc. ("Halquist") from refusing to permit warrantless inspections of its stone and gravel quarry in Waukesha County, Wisconsin. See 30 U.S.C. § 818(a)(1). The action is before the court on the Secretary's motion for summary judgment, which motion will be granted.

The Federal Mine Safety and Health Act of 1977 is a successor statute to the Federal Coal Mine Health and Safety Act of 1969, formerly 30 U.S.C. § 801 et seq., and it also incorporates the subject matter of the former 1966 Federal Metal and Nonmetallic Mine Safety Act, formerly 30 U.S.C. § 721 et seq. There is no dispute in this case that the Act includes stone and gravel quarries within its definition of mines, see 30 U.S.C. § 801(h)(1); 1966 U.S. Code

Congressional and Administrative News at pages 2851-2852, 2870, and 2874, nor is it disputed that the Act authorizes warrantless inspections of mines for the purpose of determining if the mines are in compliance with mandatory health and safety standards and if any imminent dangers to the safety of the miners exist. 30 U.S.C. § 813; 1977 U.S. Code Congressional and Administrative News at page 3427.

The defendant challenges the warrantless inspection provision of the Act on Fourth Amendment grounds. It argues that in contrast to underground mines and coal mines in particular, stone and gravel quarries are not a pervasively regulated industry and therefore do not fall within the exception to the warrant requirement of the Fourth Amendment established by the Supreme Court for such industries, see *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970); *United States* v. *Biswell*, 406 U.S. 311 (1972), making the warrantless inspection provision of the Act unconstitutional. See *Marshall* v. *Barlow's Inc.*, 436 U.S. 307 (1978).

A threshold issue is whether or not an actual case or controversy between the parties exists. On May 31, 1978, Walter Brey, a federal mine inspector, arrived at the defendant quarry for a health and safety inspection. He was allowed to perform the inspection and was also allowed in when he returned the following day. After Brey had been at the quarry for several hours on June 1, however, the owner Albin Halquist arrived and told Brey that he was harrassing the employees. Brey contends that Halquist also told him to leave and not return without a warrant. Halquist has filed an affidavit stating that he did not tell Brey to leave and said nothing about a warrant.*

---

*Plaintiff has moved to amend the complaint to correct the relevant date from May 31, 1978 to June 1, 1978. In response, defendant has filed an amended answer which contains as an affirmative defense defendant's denial that Brey was ordered to leave and not return without a

The dispute is of minor significance since the defendant has taken the position that it will not allow future inspections of the quarry without a warrant, see page 37 of Exhibit 1 to defendant's brief filed June 23, 1980, and 30 U.S.C. § 813(a) requires a twice yearly health and safety inspection of each surface mine. Since both parties seek injunctive relief with regard to the inspections, an actual dispute does exist between them. In addition, following the June 1, 1978, incident, Brey issued a citation to the defendant which was heard before an administrative law judge. See 30 U.S.C. §§ 814 and 815. Defendant raised as a defense at the hearing his claim that Brey had not been ordered to leave and that the issue of a warrant had not arisen. That issue was determined adversely to the defendant by the judge. The administrative findings are appealable to the United States courts of appeals and findings of fact, "if supported by substantial evidence on the record considered as a whole, shall be conclusive." 30 U.S.C. § 816(a)(1). That section is not directly applicable to this action which is brought instead under 30 U.S.C. § 818(a), but it does suggest the deference which this court owes to the findings of the administrative law judge. The record made before him has been submitted in its entirety to this court, and it does contain substantial evidence to support his findings of fact with reference to the search warrant issue.

With regard to the merits of the constitutionality issue, there is no dispute that the warrantless inspection provision is constitutional as applied to the coal mining industries, and courts have uniformly so held. See, e.g., *Youghiogheny and Ohio Coal Company* v. *Morton*, 364 F. Supp. 45 (S.D. Ohio 1973) (3-judge); *Marshall* v. *Donofrio*, 465 F. Supp. 838 (E.D. Pa. 1978), aff'd without opinion 605 F. 2d 1196 (3d Cir. 1979), cert.denied, 444 U.S. 1102 (1980); *Marshall*

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warrant. In both its answer and amended answer, defendant also challenges the constitutionality of the warrantless inspection provision.

v. *Sink*, 614 F. 2d 37 (4th Cir. 1980). See also *Andrus* v. *P-Burg Coal Company, Inc.*, 495 F. Supp. 82 (S.D. Ind. 1980), affirmed F. 2d (7th Cir., April 1, 1981), upholding warrantless inspections under § 502 of the Surface Mining and Reclamation Act of 1977, 30 U.S.C. § 1252(e). This is also not a case where the defendant is alleging abuse of process aside from the absence of a warrant in the manner in which the inspection was carried out. Compare *Youghiogheny and Ohio Coal Company* v. *Morton*, supra, at 52. Thus, the only issue before the court is whether 30 U.S.C. § 813(a)(1) is unconstitutional because it includes stone and gravel quarries within the class of mines which are subject to warrantless inspections.

In *Camara* v. *Municipal Court of the City of San Francisco*, 387 U.S. 523 (1967), the Supreme Court held that warrantless inspections of private property to determine compliance with municipal health codes violate the Fourth Amendment. That prohibition was extended to areas of commercial property not regularly open to the public in *See* v. *City of Seattle*, 387 U.S. 541 (1967). In *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970), however, the Court upheld a federal statute authorizing warrantless entries onto the premises of liquor dealers for the purpose of ensuring compliance with federal revenue provisions. It based its exception to the warrant requirement on the long history of federal supervision and inspection of the liquor industry. In *United States* v. *Biswell*, 406 U.S. 311 (1972), upholding the Gun Control Act of 1968, the Court approved the warrantless entry onto the premises of licensed gun dealers for the purpose of ensuring compliance with federal reporting and licensing requirements. The Court noted that "[f]ederal regulation of the interstate traffic in firearms is not as deeply rooted in history as is governmental control of the liquor industry," 406 U.S. at 314, but that regulation is crucial to preventing violent crime, that inspection is a crucial part of the regulatory

scheme, and that inspection without prior notice is reasonable because of the ease with which violations can be hidden if warning is given. The Court also noted that:

> "* * * When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection. Each licensee is annually furnished with a revised compilation of ordinances that describe his obligations and define the inspector's authority. 18 U.S.C. § 921(a)(19). The dealer is not left to wonder about the purposes of the inspector or the limits of his task." 406 U.S. at 316.

Finally, in *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978), the Court struck down a provision of the Occupational Safety and Health Act of 1970 authorizing warrantless inspections of any business operating in interstate commerce. The Court found the section to be overbroad and unreasonable in that it included within its purview almost every business in the country. Whereas *Colonnade* and *Biswell* created exceptions for industries with such a history of governmental oversight that no reasonable expectation of privacy can exist for one who chooses to enter that business, the objectionable provision of OSHA attempts to make that exception the rule for all businesses in the United States.

In *Marshall* v. *Barlow's, Inc.*, supra, at 321, the Court also stated:

> "Finally, the Secretary urges that requiring a warrant for OSHA inspectors will mean that, as a practical matter, warrantless-search provisions in other regulatory statutes are also constitutionally infirm. The reasonableness of a warrantless search, however, will depend upon the specific enforcement needs and privacy guarantees of each statute. Some of the statutes

> cited apply only to a single industry, where regulations might already be so pervasive that a *Colonnade-Biswell* exception to the warrant requirement could apply. * * *"

In a decision issued September 15, 1978, this Court declined to find that Congress' statement of purpose in 30 U.S.C. § 801 was sufficient evidence to establish that a stone quarry is part of a "pervasively regulated industry" within the meaning of the *Colonnade-Biswell* exception to the warrant requirement, and, therefore, it denied the Secretary's request for a preliminary injunction in this case.

Since that time other courts have had occasion to consider the constitutionality of 30 U.S.C. § 813(a)(1) as applied to stone and gravel quarries and most of them have upheld the statute. *Marshall* v. *Stoudt's Ferry Preparation Company*, 602 F. 2d 589 (3d Cir. 1979), cert. denied, 444 U.S. 1015 (1980); *Marshall* v. *Nolichuckey Sand Company, Inc.*, 606 F. 2d 693 (6th Cir. 1979), cert. denied 100 S. Ct. 1035 (1980); *Marshall* v. *Texoline Company*, 612 F. 2d 935 (5th Cir. 1980); *Marshall* v. *Cedar Lake Sand and Gravel Co., Inc.*, 480 F. Supp. 171 (E.D. Wis. 1979) (Gordon, J.). There are two exceptions. In *Marshall* v. *Wait*, 628 F. 2d 1255, 1259 (9th Cir. 1980), the Ninth Circuit, while purporting not to reach the issue of the facial constitutionality of the statute, found it unconstitutional as applied to a decorative stone quarry whose operation was "on the fringe of traditional mining" and whose only "miners" were the owner and his wife:

> "* * * To emphasize, Wait did not enter a pervasively or traditionally regulated business and thereby subject himself to government supervision and regulation. [Citation omitted.] It would be far more accurate to state that this legislation and regulations adopted pursuant thereto 'entered' Wait's business activity in

the very recent past and many decades after its establishment. Under this combination of circumstances, we hold that Wait has not impliedly consented to warrantless inspections of his small, family-owned and operated quarry. * * *

"* * * Blanket application of this type of regulation to businesses large and small demands that we carefully avoid the trampling under of the rights of those whose expectation of privacy in their enterprises may be real and substantial."

In *Marshall* v. *Dewey*, 493 F. Supp. 963 (E.D. Wis. 1980), probable jurisdiction noted sub nom. *Donovan* v. *Dewey*, 101 S. Ct. 937 (January 26, 1981), Judge Warren denied the Secretary's motion for summary judgment in the case of a sand and gravel quarry and dismissed the suit for injunctive relief on the ground that such quarries do not have a long history of pervasive regulation but rather have been subject to federal regulation only since the enactment of the 1966 Federal Metal and Nonmetallic Mine Safety Act. He also held that the provisions for court review of inspections give only an illusory protection to the privacy interests of individual owners since if they refuse to permit an inspection, thus forcing the Secretary to go to court for injunctive relief, they also subject themselves to a citation and possible fine before an administrative law judge, and imposition of the fine may precede the federal court decision on the propriety of the warrantless search.

The *Wait* decision is inapplicable to the facts of this case. As the administrative law judge found, Halquist Stone Company, Inc., has both a pit area for the extraction of stone by blasting and a stone cutting operation with a total of about a dozen employees. Thus, although not a huge operation, it is well within the traditional understanding of a stone quarry. I am also compelled to disagree with Judge

Warren that the lack of a *long* history of pervasive regulation takes stone quarries outside of the *Colonnade-Biswell* exception to the Fourth Amendment warrant requirement. The Gun Control Act provision upheld in *Biswell* postdates by two years the 1966 act regulating quarries and instituting a warrantless inspection procedure. I do agree that the possibility of receiving a citation and fine prior to court review imposes a burden on a quarry operator who believes he has a legitimate reason to oppose warrantless entry. If the constitutionality of the warrantless inspection provision is upheld, however, there will be few cases in which an owner will have a legitimate basis for refusing access since his consent will not be a prerequisite to a lawful search. *United States* v. *Biswell*, supra.

It would be unduly repetitive to set forth the reasoning of those courts which have upheld the constitutionality of 30 U.S.C. § 813(a)(1). The reasoning in all cases is substantially identical. Among the factors stressed are the following: the existence of a fifteen-year history of pervasive federal regulation and a long and significant, if uneven, history of state regulation, 1966 U.S. Code Congressional and Administrative News at page 2849; the significance of the federal interest in protecting the safety of miners and the history of hazards and accidents in the quarrying industry, 1966 U.S. Code Congressional and Administrative News at pages 2847 n. 1 and 2851;.1977 U.S. Code Congressional and Administrative News at pages 3403-3404 and 3427; *Marshall* v. *Stoudt's Ferry Preparation Company*, supra, at 594; *Marshall* v. *Nolichuckey Sand Company, Inc.*, supra, at 696; the limitation on the possibility of abuse created by the legislative concentration on a single industry which increases the likelihood that industry operators will be aware of the regulations and the legitimate scope of any searches, and the provision for the use of court process rather than force even though no warrant is required if consent to inspect is not given, *Marshall* v. *Stoudt's Ferry*

Preparation Company, supra, at 594; *Marshall* v. *Texoline Company*, supra, at 937; and the possibility that certain abuses could be concealed were a warrant a prerequisite, 1977 U.S. Code Congressional and Administrative News at 3427; *Marshall* v. *Stoudt's Ferry Preparation Company*, supra, at 593.

On review of the relevant decisions, I am persuaded by the reasoning of those courts which have upheld the constitutionality of the warrantless inspection provision contained in 30 U.S.C. § 813(a)(1) that it is designed to remedy significant health and safety hazards in the mines of this country; that those hazards exist in significant numbers in stone and gravel quarries as well as in operations more traditionally thought of as "mines"; that the legislation is reasonable in that it does not apply to any except the active mining areas of a quarry operation and provides reasonable notice to a quarry owner of the objectives of the inspections; that it is also reasonable in that if provides a mechanism for an operator to air any specific objections to an inspection or claimed abuses of process before a district court or an administrative law judge and then a court of appeals; and finally, I am persuaded that a quarry operator in the present day has no significant expectation of privacy and freedom from regulation in the active areas of his operation. The statute serves a legitimate governmental function, it is reasonably circumscribed, and it does not unduly infringe on the rather limited privacy expectations of a quarry operator.

For the foregoing reasons,

IT IS ORDERED that the plaintiff's motion to amend the complaint is granted.

IT IS FURTHER ORDERED that the plaintiff's motion for summary judgment is granted, and the defendant, its agents and emloyees are permanently enjoined from refusing to admit authorized representatives of the plaintiff to,

upon, or through the active mining areas of the stone and gravel quarry; from refusing to permit the inspection of the active mining areas of the stone and gravel quarry by authorized representatives of the plaintiff; and from interfering with, hindering, and delaying authorized representatives of the plaintiff in carrying out the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

Dated at Milwaukee, Wisconsin, this 28th day of April, 1981.

UNITED STATES DISTRICT COURT

By: /s/ John W. Reynolds

John W. Reynolds
Chief Judge

In the
Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-901

RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Appellant,

vs.

DOUGLAS DEWEY and WAUKESHA LIME AND STONE COMPANY,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

BRIEF FOR THE APPELLEES

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QUESTION PRESENTED

Whether Section 103(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. (Supp. II) 813(a), violates the Fourth Amendment insofar as it authorizes federal mine inspectors to conduct warrantless safety and health inspections of stone quarries.

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In the Supreme Court of the United States

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RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Appellant,

VS.

DOUGLAS DEWEY and WAUKESHA LIME AND STONE COMPANY,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

BRIEF FOR THE APPELLEES

STATEMENT OF THE CASE

Appellees agree with the Statement of Appellants, with the following exceptions and additions:

1. Customers are permitted in only a small portion of Waukesha's 300-acre premises, namely, the road extending from the scale house located at the main entrance to

the quarry to the dust plant where buyers pick up their purchases, and the small office at the dust plant. Customers are not permitted in the area where the bag machine operators work. (J.A. 23a-24a.)

2. Railroad tracks and a spur track are located along the road which runs through the center of the property. The spur is maintained by the railroad, which brings crews onto the property to work on the rail spur. This seldom occurs. (Dewey deposition at 25-26.) The bagging stations in the dust house where the bagger operators work are not visible from the railroad tracks. (J.A. 21a.)

3. Waukesha's policy required all persons on the company premises to be accompanied by a Waukesha Lime & Stone representative. (J.A. 23a.) The state safety inspector who, in August of 1979, had inspected Waukesha's operation for six or seven years (Delaney deposition, p. 4.) followed that rule. Upon arriving at the quarry, he contacted the mine office to tell Mr. Dewey or his representative the particular purpose for his visit. (J.A. 17a-18a.) Accompanied by a Waukesha representative (J.A. 18a), he was permitted to go where he wanted to go (Delaney deposition, p. 5) and to see whatever he wished. (Delaney deposition, p. 6.)

4. State inspections were authorized by the statute providing for inspection of any business subject to Wisconsin's Worker's Compensation law. (J.A. 14a.) The first Wisconsin mining rules following the federal scheme were adopted in 1972. (J.A. 16a.)

5. At the time Waukesha Lime and Stone was purchased by its present owner, Payne & Dolan, Inc., it had been operating for many years. (Bechtold deposition, p. 5.) Payne & Dolan was aware that state inspectors inspected Waukesha's materials and equipment. (J.A. 13a.)

6. Jack Delaney, state safety inspector, has never been required to obtain a search warrant to inspect any mine. (Delaney deposition, p. 11.) Waukesha always cooperated with him. (J.A. 19a.) He considers Waukesha to be a safe place to work. (J.A. 19a.)

7. On July 10, 1978, federal mine inspector Walter Brey entered Waukesha's premises and commenced his inspection over an hour before contacting the Waukesha office. (J.A. 5a.) When he finally did so, he did not explain why he was at the quarry that day, and Mr. Dewey did not assume the reason was to see whether a previous dust problem had been fixed. (Dewey deposition, p. 22a.)

8. All references to pages 25a-29a of the Joint Appendix are references to a fact statement prepared to accompany a brief submitted to the district court by the Secretary, and which was not agreed to in any way by appellees. This statement does not always reflect accurately the sworn testimony and statements from which it was supposedly drawn. Where such inaccuracies have been cited in appellant's Statement of the Case, they have been the subjects of exceptions and additions above.

SUMMARY OF ARGUMENT

The reasonableness of warrantless administrative inspections of private property has been examined in a series of cases including *Frank* v. *Maryland*, 359 U.S. 360 (1959), *Camara* v. *Municipal Court*, 387 U.S. 523 (1967), *See* v. *City of Seattle*, 387 U.S. 541 (1967), *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970), *United States* v. *Biswell*, 406 U.S. 311 (1972) and culminating in *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1979). This case, which synthesizes the general rule for determining when such searches of business establishments are constitutionally

permissible, emphasized that such instances are exceptional, and that businesses properly subject to warrantless ispections are characterized by a long tradition of close government supervision.

Waukesha Lime & Stone's quarrying business is classified as a "coal or other mine" under the Federal Mine Safety and Health Act of 1977 (Mine Act), which authorizes, as part of its enforcement mechanism, warrantless searches by mine inspectors of businesses so categorized under the act. 30 U.S.C. (Supp. II) §813 (a). While the coal mining industry has been highly regulated, at least in health and safety matters, for many years, the limestone quarrying business and others of the variety of operations under the Mine Act, do not have such a regulatory history. It is therefore not reasonable to exempt them from the protections offered by the warrant requirement.

The warrantless inspections authorized to enforce the Mine Act are not reasonable on other grounds.

First, the public interest to be served by the Mine Act, the health and safety of employees of operations coming within the purview of the Act, does not mandate warrantless inspections to accomplish its purpose. Second, the public interest is broad based and inconsistent with the rule stated in *Marshall* v. *Barlow's Inc.*, 436 U.S. at 313, that exemptions from the warrant requirement are to be the exception and not the rule. Third, a warrant based on the administrative probable cause standard adopted in *Camara* v. *Municipal Court,* 387 U.S. 523 (1967) provides the businessman with valuable and practical protections from governmental intrusion. The privacy interest of the operator is not otherwise adequately protected under the statute.

ARGUMENT

§103(a) OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, INSOFAR AS IT AUTHORIZES WARRANTLESS INSPECTIONS OF ALL OPERATIONS CLASSIFIED AS "COAL OR OTHER MINES" UNDER THE ACT, VIOLATES THE FOURTH AMENDMENT PROHIBITION OF UNREASONABLE SEARCHES.

During the past several decades, supervision and inspection of dwelling places, business entities and public facilities by regulatory agencies at all levels of government have increased dramatically. These agencies are charged with making and enforcing rules advancing various public interests recognized by Congress and other legislative bodies. From a home remodeler to a nuclear power plant operator, from airplane passengers to owners of automobiles, from Exxon and AT&T to the "mom and pop" business operator, almost no citizen or business is exempt from exposure to some form of governmental inspection. As the authority of these regulatory bodies has extended to control our personal and business lives in ever greater detail, this Court has on several occasions undertaken the difficult task of reconciling the public interests served by the enforcement of statutes and rules administered by the agencies with the rights guaranteed by the United States Constitution.

The reasonableness of warrantless intrusions onto private property for regulatory purposes such as health and safety inspections has proved to be a recurring problem. The issue has been examined in a series of cases beginning with *Frank* v. *Maryland*, 359 U.S. 360 (1959), and culminating twenty years later in *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1979).

This case raises again the right of a property owner, and especially a business property owner, to insist that a regulatory inspection of business premises be conducted in accordance with a warrant. In every significant way, this case very closely resembles *Barlow's*. Factually, the cases are nearly identical. Both cases were brought about by the refusal of permission to a federal inspector to conduct a health and safety inspection of business premises without a warrant. In both cases, such warrantless inspections were authorized by statute, Section 8(a) of the Occupational Health and Safety Act (hereinafter OSHA), 29 U.S.C. 657(a) (1970), in *Marshall* v. *Barlow's, Inc., supra,* and §103(a) of the Federal Mine Safety and Health Act of 1977 (hereinafter Mine Act), 30 U.S.C. (Supp. II) 813 (a), in this case. Both statutes were intended to improve health and safety standards in the nation's workplaces. See 29 U.S.C. 651 and 30 U.S.C. 801.

In *Barlow's,* the Secretary argued unsuccessfully that:

1. The Congressional construction of the Fourth Amendment represented by the warrantless search provision in the statute should not be rejected.

2. The businesses subject to warrantless inspections under the statute were pervasively regulated and therefore not protected by the warrant requirement.

3. The enforcement scheme required warrantless searches in order to be effective.

4. The incremental protections afforded the employer's privacy are so marginal that they failed to justify the administrative burdens that may be entailed.

5. The decision to require a warrant for OSHA searches would render the warrantless search provisions in other statutes constitutionally infirm.

With the exception of the last point, these are precisely the same arguments made by the Secretary in the instant case. Not surprisingly, the Secretary insists that *Marshall* v. *Barlow's, Inc., supra,* does not control this case, but looks to an earlier case, *United States* v. *Biswell,* 406 U.S. 311 (1972). For the reasons stated below, the analysis of *Barlow's* supplies the proper framework for deciding this case, and leads to the conclusion that §103 (a) of the Mine Act, insofar as it authorizes warrantless searches of appellees' stone quarry, violates the Fourth Amendment prohibition of unreasonable searches.

A. The Court's Holding in Marshall v. Barlow's, Inc. Formulates the Principle Justifying Warrantless Inspections of Certain Business Premises in Accordance with the Exceptions to the Warrant Rule Found in Colonnade Catering Corp. v. United States and United States v. Biswell.

1. The Historical Development of the Rationale Justifying Warrantless Inspections of Business Premises in Certain Situations Culminated in the Analysis Contained in Marshall v. Barlow's, Inc.

The issue of the constitutionality of warrantless administrative searches first crystallized in *Frank* v. *Maryland,* 359 U.S. 360 (1959), in which a conviction was upheld for refusing to permit a warrantless inspection of a residence by a health inspector. Stressing the need for enforcement of minimum housing standards, the Court found such searches sanctioned by long historical acceptance, and by safeguards to residents provided by the Maryland statute. The Court found criminal-type proceedings where a warrant is required to be totally unlike inspections pursued for the protection of the community's health, and that effective enforcement of health and safety standards required a flexible basis inconsistent with the rigorous standards demanded by the Fourth Amendment. Rather than loosen

those standards for administrative inspections, *Frank* excluded such searches from the warrant requirement altogether. *Id.* at 373.

Eight years later, *Frank* was overruled in *Camara* v. *Municipal Court,* 387 U.S. 523 (1967), and its analysis of the rights affected by administrative searches expressly rejected. In *Camara,* it was recognized that the Fourth Amendment protects, not only persons subject to police searches for evidence of criminal violations, but the right of all persons to be free from governmental intrusions onto their private property. (*Id.* at 530.) The requirement of a warrant restricts the scope of a search and provides notice to the property owner or occupant of the authority for and limits of the search, and was found to apply to administrative searches such as health inspections. (*Id.* at 532.) However, the Court in *Camara* revised its view of probable cause requirement for administrative warrants. In light of the lesser intrusion attendant upon such searches and the need to permit inspection procedures to be carried out in a systematic manner, a lesser standard of probable cause was found to support the issuance of administrative warrants. (*Id.* at 538-539.) Although, as a practical matter, the effect of both the *Frank* and *Camara* decisions was to permit inspections to be conducted where no specific violation was suspected, the adoption of the *Camara* approach had two highly significant implications. First was the recognition that there exists an important right to be free of unreasonable intrusion by governmental officials even when such intrusion has as its purpose implementation of health, safety and other rules admittedly beneficial to the public interest. Second was that the functions served by warrants are useful and indispensable, even where a lesser standard of probable cause suffices to justify their issuance. The reaffirmation of the importance of the warrant requirement in *Camara* clearly demonstrates the perception that a war-

rant does not become an empty gesture in the regulatory context.

Camara, like *Frank,* involved a resident charged with refusing to permit a city inspector to enter his dwelling. In *See* v. *City of Seattle,* 387 U.S. 541 (1967), a companion decision decided simultaneously with *Camara,* it was held that warrants are required for administrative searches, not only of residences, but also of private business property. (*See* v. *Seattle* at 545.) The Court expressly reserved the question whether the rule of *Camara* and *See* would apply to such situations as inspections required prior to issuance of a license as part of a comprehensive regulatory scheme. (*Id.* at 546.)

The application of the rule of *See* to a highly regulated and licensed business was directly addressed thereafter in *Colonnade Catering Corp.* v. *United States,* 397 U.S. 72 (1970) in which the issue was the lawfulness of a warrantless inspection of a catering company which held a state liquor license and federal tax stamp. The Court found that, because such searches for the purpose of protecting the government's interest in liquor tax revenues had been permitted from the time the Fourth Amendment to the U.S. Constitution was adopted in the eighteenth century, they were not unreasonable.

Similarly, in *United States* v. *Biswell, supra,* 406 U.S. 311, a warrantless search of a pawn shop, whose operator was federally licensed to sell guns, performed in accordance with the Gun Control Act of 1968, 18 U.S.C. §921, et seq., was approved in view of the vital public interest in controlling the interstate distribution of weapons.

Both *Colonnade* and *Biswell,* as the Court has since recognized, were responses to "relatively unique circumstances." (*Marshall* v. *Barlow's, Inc., supra,* 436 U.S. at

313.) Neither *Colonnade* nor *Biswell*, encompassing, as they did, such limited fact situations, considered the more general question of what sort of business might be exempt from the requirement that administrative searches be conducted in accordance with a warrant. This broader issue was reached in 1979, in *Marshall* v. *Barlow's, Inc., supra*, a case involving the refusal of the owner of an electrical and plumbing installation firm to permit a warrantless inspection of his business premises under the Occupational Health and Safety Act. In dramatic contrast to the narrowly drawn circumstances justifying a warrantless search in *Colonnade* and *Biswell*, the statute in *Barlow's* purported to confer powers on OSHA inspectors to search virtually every business place in America without a warrant. The Court found that, despite the importance of the purpose to be served by the provision, namely, protection of the health and safety of workers, warrantless seaches under that statute could not be permitted consistent with the Fourth Amendment. In reaching this conclusion, the Court considered its previous decisions in *Colonnade* and *Biswell* and formulated a more general method for determining when an administrative search may be conducted without a warrant.

Marshall v. *Barlow's, Inc., supra*, 436 U.S. 307, addressed two aspects of the issue: first, whether the statute authorizing the search pertains to pervasively regulated industries, to which the warrant requirement does not apply, and second, the reasonableness of warrantless searches in view of the public interest to be served by the inspection, and the expectation of privacy of the property owner. A careful examination of the opinion, in light of the policies developed in the earlier cases, suggests that these are related ways of identifying the unique characteristics distinguishing those circumstances where warrantless administrative searches are permissible.

2. The Element Distinguishing Those Businesses Excepted From the Fourth Amendment Warrant Requirement is a Long Tradition of Close Government Supervision.

While stating that an exception to the search warrant requirement has been recognized for certain closely regulated businesses, the Court in *Barlow's* declined to so characterize the businesses covered by OSHA as a class. *Marshall* v. *Barlow's, Inc., supra,* 436 U.S. at 314. The Secretary's argument that "all businesses involved in interstate commerce have long been subjected to close supervision of employee safety and health conditions," was rejected on the basis that *federal* involvement in regulating employee working conditions "has never been of that order of specificity and pervasiveness that OSHA mandates." (436 U.S. at 314.) By implication, OSHA itself failed to provide the necessary foundation for finding that Barlow's business fell into the category of closely regulated industries of the type involved in *Colonnade Catering Corp.* v. *United States, supra,* 397 U.S. 72, and *United States* v. *Biswell, supra,* 406 U.S. 311.

In *Barlow's,* the Court clearly stated the distinguishing factor by which such businesses can be identified:

> "The element that distinguishes these enterprises from ordinary businesses is a *long tradition of close government supervision,* of which any person who chooses to enter such a business must already be aware." (436 U.S. at 313.) [Emphasis supplied.]

Contrary to the approach taken by the Secretary in his brief in this case, this standard does not divide the *Biswell* and *Colonnade* criteria into two separate tests, historical regulation and urgent federal interest. Rather, the cases illustrate a common principle, namely recognition of the

distinctive factors identifying such closely regulated industries.

In *Colonnade*, the unique history of government regulation of the liquor industry, to further a public purpose which Congress had long been "most solicitous" to protect (*Colonnade Catering Corp.* v. *United States*, *supra*, 397 U.S. at 76), led to the conclusion that Congress could by statute permit warrantless inspections of such businesses.

On the other hand, in *United States* v. *Biswell*, 406 U.S. 311 (1972), the pressing public interest served by enforcement of the Gun Control Act of 1968, 18 U.S.C. §921 et seq., was the focus of attention. Although the history of governmental regulation of firearms was found to be "not as deeply rooted in history as governmental control of the liquor industry," (*Id.* at 315), such history was not entirely lacking. See, for example, the National Firearms Act of June 26, 1934, ch. 757, 48 Stat. 1236. *Biswell* was based on and intended to be consistent with *Colonnade*. (*Biswell*, 406 U.S. at 314.)

Despite their difference in emphasis, then, these two cases illustrate applications of the same principle, which was definitively enunciated in *Marshall* v. *Barlow's, Inc.*, *supra*, 436 U.S. at 313.

B. All Businesses Regulated by the Mine Act Are Not Subject to Warrantless Inspections as Pervasively Regulated Industries.

Applying the teachings of *Biswell*, *Colonnade* and finally *Barlow's*, we find that the warrantless search provision contained in §103(a) of the Mine Safety and Health Act subjects to warrantless search businesses which cannot be accurately described as pervasively regulated for pur-

poses of the exception to the Fourth Amendment warrant rule.

1. The Regulatory History of Coal Mining Does Not Provide a Basis for Treating All "Coal or Other Mines" as a Single Pervasively Regulated Industry.

The Act covers businesses far beyond those usually thought of as mines, and occupations even further removed from what is usually thought of as mining activity.[1]

Like OSHA, the Mine Act brings a large number of disparate occupations and businesses under its umbrella for purposes of protecting the health and safety of workers in these industries, as Congress intended.[2] It is not directed

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[1] 30 U.S.C. 802(h)(1) provides:

" 'Coal or other mine' means:

(A) An area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted through workers underground,

(B) Private ways and roads appurtenant to such area, and

(C) Lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailing ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this chapter, the secretary shall give due consideration to the convenience of the administration resulting from the delegation to one assistant secretary of all authority with respect to the health and safety of miners employed at one physical establishment;"

[2] ". . . it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and it is the intent of this Committee that doubts be resolved in favor or inclusion of a facility within the coverage of the Act." No. 95-181, 95th Cong., 1st Sess. (1977), p. 14.

to a single industry, as the Secretary insists, but many industries.

One of these industries, coal mining, has been found to be pervasively regulated so as to permit warrantless searches for the purpose of mine safety inspections. *Youghiogheny and Ohio Coal Company* v. *Morton*, 364 F. Supp. 45 (S.D. Ohio 1973).

Appellees recognize that coal mines have been subject to very comprehensive health and safety regulation for many years. (*Id.* at 49.)

However, the necessary long history of pervasive regulation for the entire group of enterprises governed by the Mine Safety Act may not be based on this experience of a single member of the group. The rule that exceptions to the warrant requirement must fall within "certain well-defined classes of cases," does not permit such a construction. *Camara* v. *Municipal Court, supra,* 387 U.S. at 528-9, *Marshall* v. *Barlow's, Inc., supra,* 436 U.S. at 313. Furthermore, the reasonableness of warrantless searches in pervasively regulated industries rests on the principle that,

> ". . . The businessman in a regulated industry in effect consents to the restrictions placed upon him. *Almeida-Sanchez* v. *United States,* 413 U.S. at 266, 271, 37 L.ed.2d 596, 93 S.Ct. 2535 (1973)." *Id.* at 313.

Obviously, the operator of a limestone quarry does not, by conducting his business, consent to the restrictions long ago placed on coal mine operations.

The constitutional rights of operators in such industries cannot be defined into nonexistence by a Congressional decision to call them "mines." As the district court noted in *Youghiogheny,* (*id.* at 52), Congress is not free to suspend constitutional protections by legislative enactment.

The regulatory history of coal mining is not engrafted onto other industries by such definitional sleight of hand. The Ninth Circuit put it another way in *Marshall* v. *Wait,* 628 F.2d 1255 (1980):

> "While we accord Congress great deference in matters within its constitutional competency, we cannot allow it to determine by statutory definition the privacy expectations of American citizens. It is the duty of this court to preserve the constitutional values embodied in the Bill of Rights. In this day of everincreasing federal health and safety regulation, it is especially important that we view encroachments upon individual privacy with exacting scrutiny." p. 1259.

2. Pervasive Regulation Covers All Aspects of a Business Operation.

It is questionable whether health and safety regulations alone, no matter how detailed, constitute genuinely pervasive regulation. It may be accurately said that the distribution of firearms and alcoholic beverages are pervasively regulated in that almost every aspect of their operation is subject to governmental oversight because of the public interest in controlling the products involved in these businesses. In those industries regulation encompasses such diverse matters as hours of operation, limitations on pricing and sales, labeling and advertising, licensing of premises and employees, for example. The requirement that such businesses be licensed, thereby giving the licensing authority control over the very existence of the enterprise, is a trait of such "pervasively regulated" businesses.

3. Waukesha Lime and Stone Is Not a Pervasively Regulated Business.

Waukesha's ability to do business is not dependent upon any license, state or federal. It is subject only to those

kinds of regulations covering most businesses, including tax, zoning, environmental rules and, of course, regulations protecting the health and safety of its employees.[3] In these respects, Waukesha Lime & Stone is in no different position than Barlow's, Inc. and the other companies covered by OSHA. Like those companies, Waukesha has no "long tradition of close government supervision" which characterizes industries which may be made subject to warrantless inspections.[4]

C. The Public Interest in the Health and Safety of Workers Protected by the Act Does Not Require Abandonment of the Protections to the Mine Operator Provided by a Warrant.

The health and safety of our country's workers is undoubtedly an important and appropriate target of governmental interest, as Congress recognized in its similar statements of findings and purpose in OSHA (29 U.S.C. §621), and the Mine Act (30 U.S.C. §801). But to say that an industry or occupation is hazardous is insufficient, by itself, to justify waiver of the protections of the Fourth Amendment. In the Mine Act, as in OSHA, provision for warrantless searches of premises subject to the health and

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[3] In his brief, the Secretary incorrectly states that stone quarries like Waukesha's have been subject to warrantless search by State officials since 1922. This is not the case. Stone quarries, like *all* Wisconsin businesses, are subject to certain inspections. There are no statutory provisions authorizing warrantless inspections. In fact, §§66.122 and 66.123, Wis. Stats., specifically provide for special inspection warrants to be used in making health and safety inspections.

[4] Similarly, the sand and gravel industry which also comes within the Act's purview lacks a long or extensive history of regulation. *Marshall* v. *Nolichucky Sand Co., Inc.*, 606 F.2d 668, 673 (5th Cir. 1979) and *Marshall* v. *Texoline Co.*, 612 F.2d 693, 698 (6th Cir. 1980), cert. den. 446 U.S. 935.

safety regulations in these statutes were thought necessary by Congress for effective enforcement of those acts. Nevertheless, the purpose to be served by warrantless inspections under the Mine Act does not demand the imposition of this extraordinary enforcement tool.

1. The Public Interest in the Health and Safety of Mine Workers Is Part of a Broad-based Interest in the Protection of All Workers.

The governmental interest is too broad to serve as an appropriate basis for the denial of Fourth Amendment protections. The health and safety of *all* employees in American work places is a matter for governmental concern. The interest to be served in this case is identical to the interest advanced by OSHA, differing perhaps in degree, but not in kind. As worthy as this concern may be, this Court has already found that it does not alone override the important policies served by the warrant requirement. (*Marshall* v. *Barlow's, Inc., supra,* 436 U.S. at 324.

While the scope of the Mine Act is narrower than that of OSHA, it does not focus on specific problems that can only be reached using a warrantless inspection procedure. Such a narrow focus is necessary if warrantless searches are to be confined to the "relatively unique circumstances" described in *Marshall* v. *Barlow's, Inc., supra,* 436 U.S. at 313.

2. The Public Interest Need Not Be Frustrated by Requiring Warrants for Inspections Under the Act.

The health and safety of workers need not be jeopardized by requiring a warrant for inspections under the Act. The "urgent interest" to be advanced by permitting warrantless inspections stems from the need perceived by Congress

for *unannounced* inspections. Congress, and the Secretary, appear to assume that unannounced inspections are impossible or impractical where a warrant is required. This is not the case.

Warrants are usually issued ex parte. If, upon a mine operator's refusal to permit inspection, a warrant is to be sought, the time and date on which the warrant is to be executed need not be made known to the operator. *Marshall* v. *Barlow's, supra,* 436 U.S. at 320. Where it is anticipated that consent will not be given for a search, warrants issued in accordance with an administrative plan based on specific neutral criteria can be obtained by inspectors in advance of the planned inspection. Such warrants would not be mere empty gestures, but would serve the valuable purposes of assuring operators of the authority for the search and of advising the owner of the scope and objects of the search.

The necessity for such protections is graphically illustrated in the present case. The inspector failed to make his presence known for more than an hour after his arrival. He was not accompanied by Waukesha representatives while on the company's premises. He failed to notify the appropriate company officials of the purpose of his visit. (J.A. 51, Dewey deposition, p. 22.)

The necessary "flexibility as to time, scope and frequency" described in *United States* v. *Biswell, supra,* 406 U.S. at 316, do not demand that inspection by warrant be abandoned. Here, as with the routine inspections in *Camara* v. *Municipal Court, supra,* 387 U.S. 523 at 539, ". . . there is no compelling urgency to inspect at a particular time or on a particular day. . ." This is underscored by the fact that the statute mandates only two inspections per year for operations like Wau-

kesha's, and the lack of urgency suggested by the lapse of seven months from the time Mr. Dewey refused permission to inspect Waukesha's premises to the filing of the Secretary's request for injunctive relief.

3. A Warrant Provides Necessary Protection for the Operator Not Otherwise Adequately Available Under the Statute.

The statute does not provide other adequate safeguards for the rights of the mine or quarry operator. Under the Act and its accompanying regulations, refusal to permit entry constitutes a violation punishable by a fine. 30 U.S.C. §§814, 820, and penalties may be levied before any neutral review takes place, which is exactly what happened in this case.[5] In addition, the avenue for review by a judicial officer, the action for injunctive relief, may not be invoked by the operator, but only by the Secretary.

In addition, the Act does not provide adequate standards to ensure that the warrantless inspections performed pursuant to its provisions are conducted consistent with reasonable legislative or administrative standards. While the Act provides for a minimum number of inspections per year, no maximum is set. The manner in which such inspections are to be conducted, standards for inspector conduct, and criteria for determining the frequency and

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[5] Upon refusal by appellee Dewey to permit Inspector Brey to inspect the non-public areas of Waukesha's premises and prior to the Secretary's commencing an action for an injunction, Waukesha received a citation from the Secretary resulting in a fine of $1000. Waukesha's appeal of this citation is presently before the Mine Safety and Health Review Commission. *Waukesha Lime and Stone Co., Inc.* v. *Secretary of Labor,* FMSHRC Docket No. VINC 79-66-PM The Commission has stayed action pending the decision of the Supreme Court in this case.

scope of inspections are left to the "unbridled discretion" of the inspector in the field. This is precisely the evil fostered by a warrantless search. *Marshall* v. *Barlow's, Inc., supra,* 436 U.S. at 322; *Camara* v. *Municipal Court, supra,* 387 U.S. at 532; *See* v. *Seattle, supra,* 387 U.S. at 545.

In his brief, the Secretary raises the specter of federal courts being swamped with requests for over 100,000 inspection warrants per year. He also suggests that this would impose overwhelming additional burdens on U.S. Attorneys. Yet the Secretary has not shown or even asserted that district courts and/or U.S. attorneys have been overburdened by the inspection warrant requirements in OSHA matters mandated by this Court's decision in *Barlow's.* Further, the Secretary seems to assume that warrants will have to be obtained for all Mine Act inspections. As the Court said in *Marshall* v. *Barlow's, supra,* 436 U.S. at 317, ". . . the great majority of businessmen can be expected in normal course to consent to inspection without warrants; the Secretary has not brought to this Court's attention any widespread pattern of refusal." The protections afforded by the Fourth Amendment should not be eliminated to prevent administrative inconvenience, especially when the alleged burden is speculative at best.

The Secretary argues that Waukesha has ". . . consented to the interference with privacy interests imposed by warrantless inspections under the Mine Safety Act." (Brief of Secretary, p. 43.) As the basis for his argument, he asserts that Waukesha has long been subject to three invasions of its privacy which give rise to this "consent." They are alleged to be (1) warrantless state inspection since 1922, (2) warrantless federal mine inspections since 1966, and (3) federal explosives inspections since 1970. As it was demonstrated above, state inspections in Wis-

consin provide for warrants. The fact that Waukesha may not have requested them is of no aid to the Secretary. It can be said without fear of contradition that the Secretary cannot imply a waiver from a prior failure to request a warrant. Even if the federal inspections since 1966 have been with Waukesha's consent, it is not the law that a person or entity waives Fourth Amendment protection by permitting an inspection or search on some previous occasion. The nature and limited scope of the federal explosives inspections since 1970 are hardly sufficient to demonstrate Waukesha's consent to a much wider inspection under the Mine Act.

In short, Waukesha Lime and Stone simply does not fit into the narrow category of businesses with long histories of close government supervision excepting them from the warrant requirement of the Fourth Amendment. Warrantless searches of its premises under the Mine Act are not made reasonable because of the public interest served by the Act, which, though it may be furthered by *unannounced* inspections, does not require that *warrantless* searches be authorized. In view of these considerations, and the practical safeguards provided by a warrant to the operator, warrantless searches pursuant to the Mine Safety and Health Act of 1977 are not reasonable under the Fourth Amendment.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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FILED
APR 21 1981
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
APPELLANT

v.

DOUGLAS DEWEY AND WAUKESHA LIME AND
STONE COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

REPLY BRIEF FOR THE APPELLANT

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1. In our opening brief, we argued that warrantless safety and health inspections pursuant to the Federal Mine Safety and Health Act of 1977 (Mine Safety Act), 30 U.S.C. (Supp. III) 801 *et seq.*, are permissible under the Fourth Amendment because such inspections meet the criteria established in *United States* v. *Biswell*, 406 U.S. 311 (1972), for valid warrantless administrative searches. Appellees do not appear to be in serious disagreement with our discussion of *Biswell* and our application of *Biswell's* principles to the inspection provisions of the Mine Safety Act. Appellees contend (Br. 15–16), however, that the administrative search exception applies only to "pervasively regu-

lated" industries—*i.e.*, those industries in which governmental regulation covers virtually all aspects of a business' operations and where the business is subject to licensing requirements—and that regulations protecting the health and safety of employees, no matter how detailed, cannot constitute sufficiently "pervasive" regulation to permit warrantless inspections. Appellees argue that because the Waukesha operation does not have to be licensed[1] and is subject to general regulations covering most businesses,[2] it is in no different position than the business involved in *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978), and all of the other businesses covered by the Occupational Safety and Health Act of 1970 ("OSHA"). This contention is without merit.

The Court in *Barlow's* did not suggest that a regulatory scheme directed solely at occupational safety and health conditions cannot be sufficiently pervasive to satisfy the *Biswell* criteria and therefore that war-

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[1] We note that some states have established a licensing system for mines, although Wisconsin apparently does not require an operator to obtain a license before commencing mining operations.

[2] Appellees assert (Br. 2) that the Waukesha quarry is subject to state inspection under a statute providing for inspection of all Wisconsin businesses, and that the first Wisconsin mining rules "following the federal scheme" were adopted in 1972. While this may be true, the record shows that since approximately 1914 the State of Wisconsin has set mining apart from regulation of industry generally by adopting a safety code relating specifically to the mining industry (see Bull deposition at 5–6 (Aug. 7, 1979)). Thus, for over 65 years, Wisconsin has treated mining separately from other businesses, as Congress has done under the Mine Safety Act and its predecessor statutes. In addition, as we noted in our opening brief (at 6, 32), Waukesha, unlike most businesses, is also subject to federal regulation, pursuant to 18 U.S.C. 843(f), as a permittee engaged in the lawful use of explosives.

rantless inspections under such a scheme may never be upheld. Instead, the Court held that a business does not fall within the *Biswell* exception simply because it is engaged in interstate commerce. 436 U.S. at 314. If the Court in *Barlow's* had meant to construe the Fourth Amendment as creating an absolute bar to warrantless inspections for health and safety purposes, it undoubtedly would have said so. Indeed, appellees appear to concede (Br. 14) that coal mines are pervasively regulated and may be inspected without a warrant. But, insofar as the Mine Safety Act's provisions are concerned, coal mines are no more pervasively regulated than are other mines, including stone quarries, that are covered by the Act.

Moreover, the health and safety conditions in the mining industry are not comparable to those in other industries. As we noted at some length in our opening brief (at 18–24), Congress found that mining is a uniquely hazardous industry and that workers employed in that industry require special protections not afforded to workers in other industries. There is no reason to question that congressional determination.[3]

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[3] Amici Kent Nowlin Construction, Inc., et al., refer (Br. 5–6, 14–15) to an agreement concerning regulatory jurisdiction between the Mine Safety and Health Administration and the Occupational Safety and Health Administration. 44 Fed. Reg. 22827–22830 (1979). Under Section 4(b)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 653(b)(1), OSHA does not have jurisdiction over working conditions of employees who are covered by another federal agency with statutory authority to enforce occupational safety and health standards. The purpose of the agreement is to facilitate orderly administration of the agencies' respective regulatory programs by avoiding the need to resolve jurisdictional questions on an ad hoc basis.

Amici argue (Br. 5–6) that this agreement demonstrates that Congress arbitrarily singled out certain businesses for inclusion under the Mine Safety Act while excluding other businesses in

2. Appellees also assert (Br. 6–7) that, even if stone quarries are pervasively regulated, because both the Mine Safety Act and OSHA are directed at ensuring healthful and safe working conditions for workers and because warrantless searches under OSHA were struck down in *Barlow's*, a like result is compelled here. As we pointed out in our opening brief (at 35–36), however, the Court in *Barlow's* firmly rejected the suggestion that the imposition of a warrant requirement in the OSHA context necessarily meant that warrantless search provisions in other regulatory statutes were constitutionally suspect. 436 U.S. at 321–322. Instead, the Court stated that "[t]he reasonableness of a warrantless search * * * will depend upon the specific enforcement needs and privacy guarantees of each statute." *Id.* at 321. We have demonstrated in our opening brief (at 18–33) that the enforcement needs and privacy guarantees of the Mine Safety Act are sufficient to sustain warrantless administrative searches.

3. Appellees next contend (Br. 18–20) that a search warrant is necessary in the context of administrative inspections pursuant to the Mine Safety Act because under the present warrantless inspection scheme the manner in which inspections are to be conducted and the standards for inspector conduct are left to the discretion of the officers in the field. In an effort to illustrate this point, appellees allege that in this case fed-

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which working conditions may be equally hazardous. But this case does not involve an equal protection challenge to the statutory classification, and the Act would clearly survive such a challenge in any event. We note in this connection that amici's statistics do not take account of the fact that miners, including those in the non-coal portion of the industry, are exposed to disabling, degenerative diseases whose effects may not become apparent for many years, nor do they take account of the severity of the injuries and illnesses in the mining industry.

eral mine inspector Brey failed to notify company officials of his arrival at Waukesha's premises and remained on those premises for more than one hour without being accompanied by Waukesha's representatives.

Appellees' objections are erroneous. To begin with, a search warrant requirement would add nothing to the protections that the Fourth Amendment already provides to mine operators with respect to the manner in which inspections are conducted. In *Dalia* v. *United States*, 441 U.S. 238, 255 (1979), this Court held that under the Fourth Amendment a search warrant must satisfy three basic requirements: it must (1) be issued by a neutral magistrate; (2) be based on probable cause; and (3) particularly describe the place to be searched and the property to be seized. The Court specifically rejected the argument that, in addition to these three requirements, "search warrants also must include a specification of the precise manner in which they are to be executed. On the contrary, it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant—subject of course to the general Fourth Amendment protection 'against unreasonable searches and seizures.'" *Id.* at 257 (footnote omitted). Thus, whether or not a warrant is required to inspect stone quarries and other mines, under the Fourth Amendment the same standard—"reasonableness"—governs the conduct of the officials performing the inspection.

For this reason, we fail to perceive how a warrant requirement would have prevented Brey from inspecting Waukesha's facility without notifying company officials of his presence, as appellees allege. If, in fact, Brey did perform an inspection without affording Waukesha's management an opportunity to accompany him, his conduct may have been in violation of Section

103(f) of the Mine Safety Act, 30 U.S.C. (Supp. III) 813(f). Thus, appellees' own example convincingly shows that the Act provides certain safeguards beyond those available under a warrant. Accordingly, Brey's possible violation of the statutory requirements does not provide any basis for holding the warrantless inspection provisions of the Act unconstitutional.

4. Appellees next complain (Br. 19) that the Mine Safety Act does not provide adequate legislative controls for warrantless searches because it does not establish a maximum number of annual inspections. But setting an absolute ceiling on the permissible number of annual inspections would frustrate the goals of the Act. The threat of inspection serves to deter violations of the Act's mandatory health and safety standards. If the Act did contain a maximum number of inspections, once a mine's yearly quota of inspections was met, the operator would have no incentive to remain in compliance with the standards until the following year. Furthermore, particularly hazardous conditions at certain mines may justify more frequent inspections at those mines than at others. Thus, fixing a rigid quota of annual inspections would be inconsistent with the purposes of the regulatory program.

Nor is such a result required by the Fourth Amendment. In *United States* v. *Biswell*, *supra*, the Court observed that frequent and unannounced inspections were necessary if inspections were to serve as a credible deterrent. 406 U.S. at 316. Furthermore, it is important to emphasize that if an operator believes, on the basis of the frequency of inspections, that he is being subjected to harassment, he can simply refuse entry. Mine inspectors are prohibited under the Act from making forcible warrantless entries. If the Secretary either institutes an injunctive proceeding to gain entry, or assesses a fine against the operator for refusing entry, the operator will have a full and complete

opportunity to establish his claim of harassment in court.

5. In our opening brief (at 28), we argued that a warrant requirement for inspections under the Mine Safety Act would result in heavy administrative costs at the expense of frustrating the very purpose of the Act—the protection of miners. Appellees assert in response (Br. 20) that there is no evidence that the warrant requirement for OSHA inspections has proven burdensome, and they further predict that the great majority of mine operators will consent to warrantless inspections.

In fact, however, the Secretary has recently reported a refusal rate under OSHA of approximately 2½%, resulting in nearly 1,400 refusals annually. 45 Fed. Reg. 65916, 65920 (1980). Furthermore, the Secretary has indicated that "[t]he time and resource expenditures required to evaluate and act upon these cases are significant, particularly in view of the facts that OSHA and the [Solicitor of Labor's] Office operate within a limited budget." *Ibid.* This same refusal rate would mean that, in addition to the 1,400 warrants required under OSHA, the Secretary would be forced to obtain close to 3,000 more warrants annually to carry out his responsibilities under the Mine Safety Act. Therefore, although the refusal rate may indeed be low and the great majority of operators may be expected to permit warrantless inspections, in view of the fact that the Act mandates a large number of annual inspections, even a low refusal rate would place an enormous burden on the limited resources of the agency charged with enforcement of the Act's safety and health standards, and on the courts.[4]

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[4]The amicus brief filed by the American Federation of Labor and Congress of Industrial Organizations (at 2-9) contains a

6. In our opening brief we argued (at 42–43) that Waukesha's management may be said to have consented "in effect" to warrantless inspections under the Mine Safety Act (see *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 271 (1973)), in light of the facts that Waukesha has permitted warrantless inspections by state officials since 1922 and has been subject to warrantless searches by federal mine inspectors since 1966 (under the Metal Act, a predecessor of the Mine Safety Act) and by federal explosives inspectors since 1970 (pursuant to 18 U.S.C. 843(f)). In addition, we argued (Br. 31) that operators of quarry and mill facilities such as Waukesha's are not likely to have substantial privacy interests subject to the protection of the Fourth Amendment. We noted, in this regard, that Waukesha allows inspection of its operation by a variety of outsiders, including labor union and insurance carrier representatives, and that Waukesha does not restrict public access to certain parts of its premises, including some of the areas that the Secretary sought to inspect.

Appellees assert (Br. 20–21) that the foregoing circumstances are insufficient to demonstrate that Waukesha has either "waived" its Fourth Amendment rights or affirmatively "consented" to warrantless inspections under the Mine Safety Act. We do not necessarily disagree with appellees' assertion that Waukesha's management has not been shown, as a factual matter, to have voluntarily consented to warrantless searches by federal mine inspectors. See *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973). The burden of our argument, however, is not that Waukesha has given its actual consent to be searched without a warrant by any and all government officials,

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useful synopsis of the massive amount of litigation generated by the warrant requirement for OSHA inspections.

but that the operators of Waukesha's stone quarry and the operators of similar facilities subject to warrantless inspections under the Mine Safety Act have substantially reduced privacy interests in their facilities and that a warrant is not necessary to protect those interests.

Our argument is bolstered by the decision in *Rakas* v. *Illinois*, 439 U.S. 128, 143 (1978), where this Court reaffirmed the principle, established in *Katz* v. *United States*, 389 U.S. 347 (1967), that the "capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." See also *United States* v. *Salvucci*, No. 79-244 (June 25, 1980), slip op. 8; *Rawlings* v. *Kentucky*, No. 79-5146 (June 25, 1980), slip op. 5-7. The Court in *Rakas* explained that in ascertaining whether a person may claim a legitimate expectation of privacy in a given area, it is necessary to refer either to property law concepts or to other socially recognized understandings regarding relationships of people to property. 439 U.S. at 144 n.12. The Court noted that "[o]ne of the main rights attaching to property is the right to exclude others, * * * and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude." *Ibid.* However, the Court cautioned that "even a property interest in premises may not be sufficient to establish a legitimate expectation of privacy with respect to particular items located on the premises or activity conducted thereon." *Ibid.* See, *e.g.*, *Air Pollution Variance Board* v. *Western Alfalfa Corp.*, 416 U.S. 861 (1974); *Hester* v. *United States*, 265 U.S. 57, 58-59 (1924). Although these cases involved the question whether governmental action constituted a "search," the Court has

also emphasized that the magnitude of the privacy expectation is a key factor in determining whether the added protections of the Warrant Clause are applicable. See, *e.g.*, *Cardwell* v. *Lewis*, 417 U.S. 583,590 (1974) (plurality opinion); *Cady* v. *Dombrowski*, 413 U.S. 433, 442 (1973).

In the context of administrative searches of mines, we submit that the mere fact that a mine operator has a property interest in the premises does not necessarily establish that the operator's privacy interest is so substantial as to require search warrants, especially where the enforcement needs and privacy guarantees of the statute underscore the reasonableness of warrantless inspections. Where, as here, a major portion of the work at a quarry is conducted out of doors and the operator permits access to his property by numerous persons, it is not unreasonable for society to recognize that the operator enjoys a greatly diminished privacy interest in his premises. Because the privacy guarantees of the Mine Safety Act are sufficient to protect that diminished interest, and because, as Congress expressly found, enforcement of the regulatory scheme would be frustrated by a warrant requirement, we submit that warrantless administrative inspections of stone quarries and other mines are permissible under the Fourth Amendment.

7. Amici Kent Nowlin Construction, Inc., et al., contend (Br. 26) that because the Mine Safety Act contains criminal penalties, including possible imprisonment, for willful violations (30 U.S.C. (Supp. III) 820(d)), a warrant should be required for routine administrative inspections under the Act. But the business proprietors in *Biswell* and *Colonnade* were also subject to criminal sanctions;[5] the Court nevertheless

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[5] In *Biswell*, the owner of the pawnshop that was inspected without a warrant was indicted on six counts charging him with

upheld the statutory provisions for warrantless administrative inspections in those cases. Thus, the mere existence of criminal sanctions in a regulatory statute is clearly insufficient, under the Fourth Amendment, to require a search warrant.

Amici Kent Nowlin Construction, Inc., et al.; also contend (Br. 29) that the Ninth Circuit in *Marshall* v. *Wait*, 628 F.2d 1255 (1980), invalidated the warrantless inspection provision of the Mine Safety Act. As we pointed out in our opening brief (at 36), however, the court in *Wait* specifically refused to invalidate the Act's warrantless inspection provision on its face, but concluded only that a warrant was required to inspect the particular facility involved in that case.[6]

For the reasons stated above and in our opening brief, it is respectfully submitted that the judgment of the district court should be reversed.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1981

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failing to pay a special occupational tax, in violation of 26 U.S.C. 5801, possession of unregistered firearms that were also not identified by serial number, in violation of 26 U.S.C. 5841 and 5842, and failing to maintain proper records, in violation of 18 U.S.C. 923. 406 U.S. at 313 n.2. In *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970), the proprietor was subject to prosecution under 26 U.S.C. (1964 ed.) 5606 for violating the regulatory requirements of 26 U.S.C. (1964 ed.) 5301.

[6] We note that the Seventh Circuit in *Andrus* v. *P-Burg Coal Co.*, No. 80-1916 (Apr. 1, 1981), has recently upheld warrantless inspections pursuant to the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 (Supp. III) *et seq.*

No. 80-901

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

Raymond J. Donovan, Secretary of Labor,
United States Department of Labor,

Appellant,

versus

Douglas Dewey and
Waukesha Lime and Stone Company,

Appellees.

**On Appeal from the United States District Court
For the Eastern District of Wisconsin**

BRIEF OF ACLU FOUNDATION OF SOUTHERN CALIFORNIA, *AMICUS CURIAE*, IN SUPPORT OF APPELLANT

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INTEREST OF AMICUS CURIAE[1]

This case presents the question whether warrantless safety and health inspections, authorized by Section 103(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. (Supp. II) § 813(a), violate the Fourth Amendment.

[1] The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court pursuant to Rule 36.2 of the Rules of this Court.

For nearly 60 years the American Civil Liberties Union has devoted itself exclusively to protecting the fundamental civil rights of persons within the United States. The ACLU Foundation of Southern California is a regional affiliate of the American Civil Liberties Union.

The ACLU in Southern California itself was born out of a labor dispute during which citizens protesting the arrest of striking workers on a picket line were themselves arrested for publicly reading the Declaration of Independence. Since its inception, the ACLU Foundation of Southern California has consistently supported the fundamental individual and collective rights of workers and has appeared before this Court on such issues. (See, e.g., *Babbitt v. Farm Workers,* 442 U.S. 298 (1979).)

The instant case implicates the fundamental rights of workers. Specifically, in the Mine Safety and Health Act of 1977 Congress has determined that the mining industry is sufficiently dangerous to require warrantless health and safety inspections limited to the work areas of the mine workers. Congress has further determined that to effectuate the warrantless inspection program the consent of the mine workers, individually and collectively, to such inspections may be inferred.

The decision below improperly invalidated the Act on the ground that it violates the Fourth Amendment rights of the mine operators. In so doing, the district court failed to recognize the mine workers' right to consent to the limited inspections of their work areas and thereby to benefit from the expertise of inspectors trained to recognize imminent dangers and compliance with corrective orders.

Amicus agrees with the Appellant that the mining industry is of such a dangerous nature that the consent of the mine operator should be implied under this Court's prior decisions in *United States v. Biswell,* 406 U.S. 311 (1972) and *Colonnade Catering Corp. v. United States,* 397 U.S. 72 (1979). However,

in this brief amicus will argue that the consent of the mine worker to the limited inspections provided by the Act should be implied and validated. Accordingly, even without the consent of the mine operator, there is no Fourth Amendment violation.

I.

SUMMARY OF ARGUMENT

A. A search or inspection authorized by consent is "wholly valid." *Schneckloth v. Bustamonte,* 412 U.S. 218, 222 (1973). The necessary permission to search may be obtained either from the owner of the premises or from a third party who possesses a "sufficient relationship to the premises or effects sought to be inspected." *United States v. Matlock,* 415 U.S. 164, 171 (1974). In addition, under appropriate circumstances the necessary consent will be implied from an examination of the activity in which the "consenting" party is engaged. See *United States v. Biswell,* 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States,* 397 U.S. 72 (1970).

B. Under these fundamental principles of Fourth Amendment law, the warrantless safety and health inspections authorized by Section 103(a) of the Mine Safety Act are constitutionally permissible.

1. Mine employees have a sufficient relationship to their work areas to permit the warrantless inspections authorized under Section 103(a) of the Mine Safety Act. Those inspections have been carefully limited to areas over which the workers have joint access with the operator. Accordingly, it is reasonable to conclude that the workers, as well as the operator, can permit inspections to determine whether imminent danger exists or whether the company is complying with mandatory health and safety standards.

2. To be sure, there is no express employee consent to inspect the work areas of mines. Nevertheless, Congress has determined that, in view of the historic employer-

employee relationship in the mining industry, it is unreasonable to expect such express consent to safety and health inspections of work areas by mine employees. Accordingly, Congress in the Mine Safety Act has found, in effect, that public policy requires that such consent be implied.

3. A finding of implied consent by mine employees to safety and health inspections of their work areas is reasonable under the Fourth Amendment. Such implied consent should be upheld by this Court because of the importance of the inspections, the limits placed on the time, place and manner of the inspections and the restricted privacy interest of the mine operator in preventing the warrantless inspections authorized by Section 103(a) of the Mine Safety Act.

II.

MINE EMPLOYEES CAN GIVE VALID, THIRD-PARTY CONSENT TO WARRANTLESS INSPECTIONS OF THEIR WORK AREAS

A. Third Parties May Validly Consent To Warrantless Searches

This Court has repeatedly recognized both that a search conducted pursuant to a valid consent is constitutionally permissible, *e.g., Schneckloth v. Bustamonte,* 412 U.S. 218, 222 (1973); *Katz v. United States,* 389 U.S. 347, 359 n. 22 (1967) ("A search to which an individual consents meets Fourth Amendment requirements"), and that such consent may be obtained from a third party with a sufficient relationship to the premises or effects to be inspected. *E.g., United States v. Matlock,* 415 U.S. 164, 171 (1974); *Frazier v. Cupp,* 394 U.S. 731, 740 (1969).

In *Matlock* the Court explained that the validity of a third party consent depended not upon formal, legal refinements, but upon an analysis of the actual relationship between the consenting party and the effects to be inspected:

"[W]hen the prosecutor seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.[7]

"7. Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justified the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements, but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the coinhabitants has the right to permit the inspection in his own right and that the others have assumed the risk and that one of their number might permit the common area to be searched."

415 U.S. at 171 & n.7 (citations omitted). See also *Frazer v. Cupp, supra,* at 740, in which the Court upheld the validity of a third-party-consent search and refused to engage in "metaphysical subleties" relating to notions of agency and express authority.

B. Mine Employees Possess A Sufficient Relationship To Their Work Areas To Permit Warrantless Safety and Health Inspections

Applying the practical, "sufficient relationship" test articulated by the Court in *Matlock*, it is apparent that mine employees may validly consent to the limited health and safety inspections of their work areas authorized by the Mine Safety Act.

The Mine Safety Act requires frequent inspections of coal or other mines, with a minimum of four complete inspections of underground mines each year, and a minimum of two in-

spections for surface mines per year. The purposes of these inspections are to determine whether an imminent danger exists and whether the company is complying with mandatory health or safety standards. 30 U.S.C. (Supp. II) § 813(a). The statute directs that no advance warning is to be given only when the inspection is made for one of these limited purposes. *Ibid.*[2] Moreover, as interpreted by certain Courts of Appeals, these provisions permit warrantless inspections only in the "active workings" of mines. A warrant is still required for the "inspection of offices and other areas where the operator has general expectation of privacy." *E.g., Marshall v. Nolichuckey Sand Co.*, 606 F.2d 693, 696 (6th Cir. 1979).

Although the mine worker does not have a property interest in the usual sense in the areas to be inspected, the warrantless inspections authorized by the Mine Safety Act are thus carefully limited to areas over which the workers enjoy mutual use and joint access with the operator. As to the limited areas to be inspected under this statutory scheme, it is reasonable to recognize that the mine workers, as well as the operator, can permit the inspection. Cf. *United States v. Miller*, 425 U.S. 435, 442 (1976) (holding that a depositor's interest in bank records created by information he/she had furnished the bank in the ordinary course of business was not sufficient to overcome the bank's compliance with a subpoena which ordered production of the records.)

Significant difference between the broad search rights authorized under Section 8(a) of the Occupational Safety and Health Act of 1970 (OSHA) and the limited inspection permitted by Section 103(a) of the Mine Safety Act distinguish this case from *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978).

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[2] The Act also provides for warrantless "spot inspection[s] . . . during every five working days at irregular intervals," if "methane or other explosive gases" are present, or if a gas explosion has occurred resulting in a death or serious injury within the previous five years, or "some other especially hazardous condition" exists. 30 U.S.C. (Supp. II) § 813(i). It can hardly be gainsaid that a mine worker would consent to inspections in such circumstances, and such consent is therefore properly inferred.

Section 8(a) of OSHA authorized the Secretary to enter *any* establishment or area where work was being performed by an employee and inspect "all pertinent conditions, structures, machines, apparatus, devices, equipment and materials." In addition, by regulation the Secretary had expanded the scope of any search to include records related to the purpose of the inspection. 29 C.F.R. § 1903.3 (1978). See *Marshall v. Barlow's Inc., supra*, 436 U.S. at 324 n.22. The direct relationship of the employee to the materials and papers that were subject to warrantless inspection under OSHA was thus quite tenuous.

The inspection provisions of the Mine Safety Act, by contrast, are more limited and closely defined. As a result, the permissible scope of inspection under the statute relates directly to the employees' activities inside the mine and to the areas over which they have joint access and control with the operator. Cf. *Air Pollution Variance Bd. v. Western Alfalfa Corp.*, 416 U.S. 861, 865 (1974) (upholding warrantless inspection of smoke emissions following entry onto owner's premises and noting that constitutionally permissible inspection was not "related to respondent's files or papers"). Accordingly, recognizing the employee's right to consent to an inspection under the Mine Safety Act is both reasonable and fully consistent with this Court's invalidation of OSHA inspections in *Barlow's*.

III.

MINE EMPLOYEES HAVE GIVEN THEIR IMPLIED CONSENT TO WARRANTLESS HEALTH AND SAFETY INSPECTIONS OF THEIR WORK AREAS

A. This Court Has Recognized The Validity of an "Implied Consent" To Warrantless Administrative Inspections

This Court has recognized that persons may impliedly consent to warrantless administrative searches. Thus, in *United States v. Biswell*, 406 U.S. 311 (1972), the Court held that a

pawnshop operator who was federally licensed to deal in firearms had by virtue of his/her choice of profession effectively waived any constitutional objection to reasonable searches of the premises. Mr. Justice White wrote:

> "When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms and ammunition will be subject to effective inspection."
>
> 406 U.S. at 316.

Similarly, in *Colonnade Catering Corp. v. United States,* 397 U.S. 72, 77 (1970), the Court approved a warrantless inspection of a licensed liquor dealer's storeroom where the dealer reasonably was aware of the long history of "close supervision and inspection" of the liquor industry by government. "The businessman in a regulated industry in effect consents to the restrictions placed upon him." *Almeida-Sanchez v. United States,* 413 U.S. 266, 271 (1973) (summarizing *Biswell* and *Colonnade*).

Here, the mine operator has chosen to enter a business with well known, even notorious dangers. The *Colonnade* and *Biswell* principles instruct that the consent of the mine operator should be inferred. More importantly, it is manifestly proper to infer the consent of the mine *worker* to the limited inspections of the work area provided for in the Act for the purpose of protecting that miner's life and health.

B. It is Reasonable To Infer the Consent of Mine Employees to the Health and Safety Inspections Authorized By the Mine Safety Act

The entire thrust of the Federal Mine Safety & Health Act is to benefit and protect what Congress has declared is the mining industry's most "precious resource—the miner." (30 U.S.C. (Supp. II) 801(a)).

As it was reasonable to infer consent to a warrantless inspection from the pawnshop operator in *Biswell* and the liquor dealer in *Colonnade,* so it is reasonable to infer consent

from mine operators in this most dangerous industry. Furthermore, it is entirely reasonable to infer consent of the mine employee to safety and health inspections of his or her work area without a warrant.

The work area inspection is for the miner's benefit and protection. In sharp contrast to its impact upon the parties whose consent was implied in the *Biswell* and *Colonnade* cases, the inspection here places no burden upon the miner. See *Almeida-Sanchez, supra,* 413 U.S. at 271. No discernible privacy interests of the miner are implicated; the nature and purpose of the inspection could hardly be more agreeable to the miner. There is simply no reasonable basis for declining to infer the miner's consent to inspections expressly designed to benefit and protect that miner.

1. *Congress determined that it was reasonable to infer consent*

The plain language of the Act and its legislative history make clear the Congress found it reasonable to infer consent from the miner employees whose work areas would be subjected to warrantless inspections. The Congressional findings and declaration of purpose included within the Act state that the law was drafted to afford the miner (and his/her family) protection for his/her health and safety:

> "Congress declares that—
>
> "(a) the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource—the miner;
>
> "(b) deaths and serious injuries from unsafe and unhealthful conditions and practices in the coal or other mines cause grief and suffering to the miners and to their families;
>
> "(c) There is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's coal or

other mines in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines.

" . . .

(g) It is the purpose of this chapter (1) to establish interim mandatory health and safety standards and . . . to develop and promulgate improved mandatory health or safety standards to protect the health and safety of the Nation's coal or other miners; (2) to require that each operator of a coal or other mine and every miner in such mine comply with such standards . . . ."

Section 102(a) of the Act, 30 U.S.C. (Supp. II) 801.

The Act's legislative history is to the same effect:

"Numerous disasters in both coal and non-coal segments of the industry underscore those areas of inadequacy of our current law and the fact that the enforcement and administration of our current mine health and safety programs has failed to produce the level of protection for our nation's miners which should be within the capacity of our current mine safety laws.

" . . .

"Mine operators still find it cheaper to pay minimal civil penalties than to make the capital investments necessary to adequately abate unsafe or unhealthy conditions, and there is still no means by which the government can bring habitual and chronic violators of the law into compliance."

S. Rep. No. 95-181, 95th Cong., 1st Sess.; 1977 U.S. Code Cong. & Adm. News 3401, 3404.

See also Id. at 3407-3409, 3426-3427 ("the primary objective of the Act is to assure the maximum safety and health of miners.")

2. *A finding of implied employee consent to warrantless health and safety inspections is reasonable under the Fourth Amendment*

The determination by Congress that the miner would consent to—in fact welcome—a warrantless inspection of the work area is reasonable. The previously-cited Senate Report documented the extreme dangers that are now part of the mining profession, and concluded that frequent inspections were essential to improve health and safety conditions. *See, e.g.,* 1977 U.S. Code Cong. & Adm. News at 3404, 3407-3409, 3426-3427. The warrantless inspection provided for in the Act is concerned with collecting that information (and only that information) which the reasonable miner would want made available to the government—information "relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in the mines." Section 103(a) of the Act, 30 U.S.C. (Supp. II) 813(a). It is at minimum then, the inspection which the miners themselves would direct, were they so positioned to act in their own best interests.

There exists an additional reason why a finding of implied consent is rational in this case. It is the miners' work area that is inspected by government, and it is their health and safety which are to be protected by the inspection. But it is not their mine. The tough practicalities of the miner-mine operator relationship make actual consent by the former to a warrantless, administrative inspection improbable, no matter how strongly that inspection will benefit his/her health and safety. A sound basis supports this conclusion.

First, the likelihood is that the worker will never be questioned for consent. The operator controls access to the mine. If the owner does not want an inspection, he/she will simply deny the inspector access to the miners' work areas.

Second, the miners are caught in an obvious squeeze; they are dependent economically upon the operator. They are unlikely to forget the source of their jobs, assignments, and

salary. If the operator refuses to consent to inspection of the mine, then the unmistakable message is that employees ought to act similarly. The miners will quickly understand that consent invites open and subtle acts of discrimination and reprisal.

Further, where working areas within the mine may be expected to fail federal standards for health and safety, the risks to the consenting miner will be perceived as especially high—the miners may rationally assume that their employer will judge them responsible for the cost of achieving compliance, and for whatever sanctions are imposed. A requirement that workers affirmatively consent to warrantless inspections of their work areas would therefore nullify their effectiveness where they are needed most.

Provisions of the Act unrelated to the warrantless inspection also reflect Congressional appreciation of the unreasonableness of demanding that workers openly cross their employer's interest in order to vindicate their own. Section 201, 30 U.S.C. (Supp. II) 813 (g)(1), for example, states that the government will preserve as confidential the identities of all miners who give notice of conditions of imminent danger.

Moreover, the Act confers upon the individual miner the benefit of the expertise of the inspector trained to recognize the dangers presented and to determine whether compliance has been achieved. The benefits of such expertise should not be lightly discounted nor deemed to be waived simply because the operator refuses to allow an inspection.

For instance, the Act provides for notice to the miner of exposure to toxic or harmful materials and further provides to miners or their representatives the right to observe the monitoring or measuring of the presence of such agents. (30 U.S.C. Supp. II, § 813(c).) It also provides a right to an immediate inspection if a miner or the miners' representative believes the Act has been violated—while carefully protecting the complainant's confidentiality to prevent retaliation and reprisal. (*Id.*, § 813 (g)(1).)

By providing these rights, Congress did not shift to every individual miner the burden of developing the sophistication and expertise of the trained inspectors authorized by the Act to exercise that expertise on their behalf. It cannot reasonably be assumed that each miner possesses or will develop such expertise, or that any miner would waive an entitlement to the expertise of trained inspectors to determine whether indeed imminent danger exists or if compliance has been achieved.

On the contrary, it is indisputably more reasonable to infer the consent of the miner to the inspections provided by the Act and to the exercise of expertise by trained inspectors for the miner's benefit.

In sum, a finding of implied consent by mine employees to safety and health inspections of their work areas is reasonable under the Fourth Amendment. Such implied consent should be upheld by this Court because of the importance of the inspections, the limits placed on the time, place and manner of the inspections and the restricted privacy interest of the mine operator in preventing the warrantless inspections authorized by Section 103(a) of the Mine Safety Act.

CONCLUSION

The judgment should be reversed.

Dated: March ....., 1981

Respectfully submitted,

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PETITION FILED
MAR 18

No. 80-901

IN THE

Supreme Court of the United States

October Term, 1980

RAYMOND DONOVAN, SECRETARY OF LABOR
UNITED STATES DEPARTMENT OF LABOR

Appellant,

v.

DOUGLAS DEWEY AND
WAUKESHA LIME AND STONE COMPANY

Appellees.

On Appeal from the United States District Court for the Eastern District of Wisconsin

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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IN THE

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October Term, 1980

No. 80-901

RAYMOND DONOVAN, SECRETARY OF LABOR
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Appellant,

v.

DOUGLAS DEWEY AND
WAUKESHA LIME AND STONE COMPANY

Appellees.

**On Appeal from the
United States District Court
for the Eastern District of Wisconsin**

MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS TO FILE A BRIEF AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of the position of the appellant in this case.

INTEREST OF THE AFL-CIO

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 104 national and international labor organizations representing approximately 13,500,000 employees throughout

the United States. These statutes are the primary safeguards for worker health and safety, and the government's ability to make prompt inspections without prior warning is essential to their effective enforcement. For that reason the Federation filed a brief *amicus curiae* in *Barlow's* and seeks to present its views to the Court in this case.

ISSUE TO BE COVERED IN THE BRIEF AMICUS CURIAE

Barlow's was decided upon the understanding that "requiring warrants to inspect will [not] impose serious burdens on the inspection system or the courts, will [not] prevent inspections necessary to enforce the statute, [and] will [not] make [such inspections] less effective." 436 U.S. at 314.

Almost three years have passed since *Barlow's* was decided. In that relatively short period of time, at least 12 federal district court cases and 21 federal court of appeals cases deciding various issues regarding OSHA inspections have appeared in the principal federal reporters. Further, OSHA has been collecting, at least since October, 1978, detailed statistics upon refusals of entry and upon the means to obtain entry.

This "evidence", of course, was necessarily developed under OSHA rather than MSHA. While there are significant differences between the two Acts, these differences would appear to have no relationship either to the likelihood of employer resistance or to the types of issues to be raised as justification for resisting inspection. We devote our brief to detailing significant "evidence" of the possible effect upon the enforcement process of a warrant requirement now available, and to drawing the lessons that emerge from that evidence.

CONCLUSION

For the above stated reasons this motion for leave to file a brief *amicus curiae* should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1980

No. 80-901

RAY MARSHALL, SECRETARY OF LABOR
UNITED STATES DEPARTMENT OF LABOR

Appellant,

v.

DOUGLAS DEWEY AND
WAUKESHA LIME AND STONE COMPANY

Appellees.

On Appeal from the
United States District Court
for the Eastern District of Wisconsin

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the AFL-CIO in this case is set forth in that motion.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents with regard to inspections under § 103(a) of the Mine Safety and Health Act ("MSHA"), 30 U.S.C. § 813(a), a question parallel to that decided in *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, concerning Occupational Safety and Health Act ("OSHA") inspections: whether, when consent is withheld, a warrant is required by the Fourth Amendment.

The Government argues, and several Courts of Appeals have agreed,[1] that this case is distinguishable from *Barlow's*, where the Court held that a warrant is required, both because the relevant statute is restricted to a single, particularly hazardous industry, and because the statute itself provides, to an extent greater than OSHA, sufficient assurance that "the occurrence and frequency of inspections are not left entirely to the unfettered discretion of inspectors in the field" (Jurisdictional Statement ("Juris. St.") at 15), thus obviating the need for individualized warrants to provide that assurance. We agree with this argument and do not here repeat the Government's demonstration. Rather, we address in this brief a pertinent line of inquiry not thus far discussed by the parties to this case.

Barlow's was decided upon the understanding that "requiring warrants to inspect will [not] impose serious burdens on the inspection system or the courts, will [not] prevent inspections necessary to enforce the statute, [and] will [not] make [such inspections] less effective." 436 U.S. at 314. The Court recognized, however, that the *Barlow's* "holding itself might have an impact on whether owners choose to resist requested searches," but determined to "await the development of evidence not present on this record to determine how serious an impediment to effective enforcement this might be." *Id.* at 316 n. 11.

Almost three years have passed since *Barlow's* was decided. In that relatively short period of time, at least 33 federal district court and federal court of appeals cases deciding various issues regarding OSHA inspec-

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[1] *Marshall* v. *Texoline Co.*, 612 F.2d 935 (C.A.5); *Marshall* v. *Nolichuckey Sand Co.*, 606 F.2d 693 (C.A. 6); *Marshall* v. *Stoudt's Ferry Preparation Co.*, 602 F.2d 589 (C.A. 3).

tions have appeared in the principal federal reporters. Many more similar cases have been litigated in federal district court but not officially reported. See, e.g., *In The Matter of Establishment Inspection of Mason Co.*, 7 OSHC (BNA) 1557 (W.D. Ind.); *Marshall* v. *Trinity Industries*, 7 OSHC (BNA) 1851 (W.D. Okla.); *In The Matter of Establishment Inspection of Wisconsin Steel*, No. 79 C4284 (N.D. Ill. 12/28/79). State reporters as well are beginning to be filled with cases in which employers have resisted OSHA inspections and raised before courts a large array of contentions supporting their resistance.[2] Further, OSHA has been collecting, at least since October, 1978, detailed statistics upon refusals of entry and upon the means taken to obtain entry. When, for reasons to be later explained, OSHA found it necessary to propose and then to promulgate a rule regarding its authority to obtain *ex parte* warrants rather than instituting full-blown adversary proceedings if inspection was resisted, OSHA spread upon the public record in the rulemaking proceeding both summaries of these statistics and anecdotal material gathered from regional offices of the Solicitor of Labor regarding some aspects of their post-*Barlow's* experience. *See* 45 Fed. Reg. 65916 (October 3, 1980); Record, Docket No. W-001, Exhibit 3 (hereafter cited simply "Exhibit ——".

This "evidence," of course, was necessarily developed under OSHA rather than MSHA. While there are, as previously mentioned (p. 2, *supra*), significant differ-

[2] OSHA provides for state enforcement of health and safety standards if certain conditions are met. 29 U.S.C. § 661. Twenty-one states currently have approved state plans. In those states, litigation concerning inspection resistance would ordinarily be in state court. Because of the sheer volume of cases which have been generated by *Barlow's* in less than three years—157 cases were found by shepardizing *Barlow's*, of which 65 were state court cases —we have limited our present inquiry to federal court cases.

ences between the two Acts, these differences would appear to have no relationship either to the likelihood of employer resistance to inspections or to the types of issues to be raised as justification for such resistance. We devote this brief to detailing significant "evidence" of the possible effect upon the enforcement process of a warrant requirement now available.

The overall lesson that emerges from that survey is that whether or not a warrant requirement will impede effective enforcement of OSHA, MSHA, or any other health and safety protection program depends upon the details of that requirement, both procedural and substantive.

Before presenting any of the legal materials, we believe some general observations regarding the scope of the resistance to inspection and the zeal with which some employers are determined to exploit every latent legal ambiguity by demanding interminable hearings may be of aid in evaluating the likely effect of a warrant requirement upon the safety and health inspection enforcement effort. We therefore briefly discuss this background in Part I, *infra*.

We then show in Part II, *infra*, that because *Barlow's* did not define "[t]he quantum of probable cause necessary for issuance of an administrative warrant . . . with precision" (*West Point Pepperell, Inc.* v. *Marshall*, 496 F. Supp. 1178 (N.D. Ga.), massive, and in many instances purely dilatory litigation has ensued on that question. This is itself disruptive of enforcement efforts, and too frequently has resulted in a level of judicial scrutiny of inspection decisions which severely hampers an effective inspection system, and which, we submit, this Court did not mandate in *Barlow's*.

In Part III, *infra*, we demonstrate that *Barlow's* has

given rise as well to employer procedural claims—including, most prominently, a claimed right to adversary rather than *ex parte* warrant proceedings—which have in fact led to substantial enforcement problems, and which, as this case is now structured, may well arise again under MSHA.

There is an obvious connection between these substantive and procedural problems: If the quantum of probable cause the Court meant to require in *Barlow's* is, as we believe, minimal, then it would be feasible for the enforcing agency to obtain "*ex parte* warrants in advance [of an inspection attempt]." *Barlow's, supra,* 436 U.S. at 316. If, on the other hand, the substantive showing is to be such that, as the Solicitor of Labor's Office has reported "[i]t is not unusual for an attorney to spend one to three days in the preparation of warrant documents" (Ex. 3-7), establishing effective safety inspection will prove to be impossible.

ARGUMENT

I

Scope of Employer Resistance to Safety and Health Inspections

While recognizing that the decision itself could alter the situation, the Court in *Marshall* v. *Barlow's Inc.,* 436 U.S. 307, 316 n. 11, observed that "[t]he great majority of businessmen can be expected in normal course to consent to inspection without warrant," noting that "the Secretary has not brought to this Court's attention any widespread pattern of refusal." In one sense, this observation remains valid under OSHA: a large majority of inspection attempts continue to go forward on a consensual basis, with the refusal remaining rather small on a *percentage* basis—on the order of two to three percent.[3] In absolute terms, how-

[3] *See* Ex. 3-18.

ever, the number of refusals of entry to federal inspectors is quite high: about 1400 refusals annually.[4] Further, the bulk of the refusals are in relatively large establishments of over fifty employees, and not in smaller establishments of the type which might involve more traditional privacy concerns. That the inspection-resisting firms are substantial enterprises is reflected in the resources they can apparently call upon to finance legal maneuvers manifestly designed only to forestall inspection.[5] Among the legal contentions litigated to the appeals court level *after Barlow's* have been:

> —whether "§ 8(a) of [OSHA] [is] unconstitutional to the extent that it allowed warrants to be granted ex parte and . . . without probable cause." *Babcock &*

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[4] Once again (*see* p. 3, n.2, *supra*), it is important to recognize that this number does *not* include state plan states, and therefore understates the magnitude of the problem.

[5] There has been no lack of organized encouragement to employers to resist inspection. *See, e.g.*, G. Schein & J. Runft, *When OSHA Knocks At Your Door, Advice For You and Your Attorney* (American Conservative Union, 1979).

The information provided by these sources to employers, while well-calculated to encourage resistance to inspections, is not noteworthy for its accuracy. For example, the Schein & Runft pamphlet tells employers that:

> "If the inspector has come to you simply on a 'random fishing expedition' (there has been no accident, illness, death or complaint from your employees) it would be virtually impossible to justify to the magistrate the issuance of a warrant. . . . The key point to remember is that the magistrate must be given some factual basis for concluding that a violation exists at the time that warrant is requested." [*Id.* at 3, 7.]

Compare the section of the same pamphlet entitled "Advice for Your Attorney" ("probable cause for an administrative warrant need not be based on specific evidence of an existing violation.") *Id.* at 12.

Wilcox Co. v. *Marshall*, 610 F.2d 1128, 1132 (C.A. 3): *compare Franks* v. *Delaware*, 438 U.S. 154, 169 (criminal warrant proceedings are ordinarily held *ex parte* to preserve element of surprise.)

—whether despite "the statement in *Barlow's* that "[p]robable cause in the criminal sense is not required" (436 U.S. at 320), "in the employee complaint situation, . . . traditional criminal probable cause should be required to justify issuance of a warrant." *Burkart Randall Div. of Textron, Inc.* v. *Marshall*, 625 F.2d 1313, 1317 (C.A. 7).

—whether despite the absence of any "indication in the Act . . . [forbidding] . . . an inspection . . . on the basis of an informal employee complaint" (*id.* at 1321), a "warrant is invalid because it is based upon employee complaints which are not in writing." *Id.*

—whether a warrant was invalid because "OSHA internal procedures require that the Area Director [rather than a safety supervisor] make the selection for inspection," where there was an agency regulation defining "Area Director" to include "any . . . person . . . authorized to act for such . . . officer." *Marshall* v. *Milwaukee Boiler Mfg. Co., Inc.*, 626 F.2d 1339, 1347 (C.A. 7).

—whether an inspection warrant was invalid because the warrant application referred to prior findings of "serious health hazards" in the plant, with a resulting need to ensure abatement, but the prior violations found were not "serious" violations within the meaning of 29 U.S.C. § 666(j). *Pelton Casteel, Inc.* v. *Marshall*, 588 F.2d 1182, 1187 (C.A. 7).

—whether "no nonconsensual administrative searches are possible under [OSHA]" and whether "the lesser showing of probable cause standard for administrative searches is unconstitutional." *Plum Creek Lumber Co.* v. *Hutton*, 608 F.2d 1283, 1287 (C.A. 9).

As is to be expected, the same dogged persistence has been exhibited by employers seeking to avoid inspection at the trial court level. Often, employers refused to submit to inspection when a warrant *was* presented. *See*, e.g., *West Point-Pepperell, Inc.* v. *Marshall*, 496 F.Supp. 1178, 1180 (N.D. Ga.); *Marshall* v. *Pool Offshore Co.*, 467 F. Supp. 978 (W.D. La. 1979); *Marshall* v. *Berwick Force & Fabricating Co.*, 474 F.Supp. 104 (N.D. Pa.). As one court commented in holding an employer who disobeyed a warrant in civil contempt, the arguments advanced to justify such refusal "may have been calculated to—at least in part—both obscure the relevant issues and mislead the court as to the law and standards to be applied." *In the Matter of Establishment Inspection of Federal Clearing Die Casting Co.*, 484 F.Supp. 215, 217 (N.D. Ill.).

The practical effects of this concerted strategy of resistance have been several. First, the participating employers have succeeded in forestalling entirely a substantial percentage of attempted inspections.[6] Second, where warrants were issued, the need to resort to warrants resulted in an *average* delay of thirty-six days from the date of denial of entry to the date of inspection. Ex. 3-18, p. 3. Where the employers successfully insisted upon adversary proceedings (see Part III, *infra*), the delays were considerably longer,[7] due at least in part to hearings lasting

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[6] In the eighteen month period between October, 1978 and April, 1980, warrants were either denied or not sought in 32.1% of the instances in which entry was refused. 45 Fed. Reg. 65923 & Ex. 3-18 p. 2. Most of these failures to go forward were due to agency decisions not to commit resources to seeking the warrants. *Id.*

[7] The record substantiates the agency's experience that obtaining warrants after an adversary hearing delays the Secretary's entry

as long as five days. 45 Fed Reg. 65919; *BP Oil, Inc.* v. *Marshall,* E.D. Pa. No. 80-2031 (Feb. 18, 1981). Finally, energies which could otherwise be devoted to inspections were devoted to preparing the lengthy warrant applications demanded by some courts,[8] and to presenting such applications to the courts, often along with live testimony. Thus, the employers who have denied entry to OSHA inspectors have had a major adverse impact on the effective enforcement of the Act.

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onto an employer's worksite. Significant delays in obtaining warrants after adversary hearings have been experienced by various Regional Solicitor offices. The New York Regional Solicitor's Office reports that, of fifteen post-*Barlow's* adversary proceedings involving warrants, three cases took three months to resolve, one case took four months, three cases presently awaiting the court's decision have already taken four months, and one case that is awaiting the court's decision has already consumed eight months. Exhibit 3-6. The Dallas Regional Solicitor's Office reports that adversary hearings delay the inspection from ten to sixty days. Exhibit 3-7. The Philadelphia Regional Solicitor's Office lists one case in which a warrant was issued five months after an adversary hearing and one case in which no decision has been issued even though six months have elapsed since an adversary hearing was held. Exhibit 3-9.

[8] *See,* e.g., *Matter of Urick Property,* 472 F.Supp. 1193, 1195 (W.D. Pa.), which held *inadequate* to support a warrant a "voluminous" application containing:

> "A six page general statement, plus numerous appendices showing the administrative adoption of the N.E.P. (National Emphasis Program) and the F.I.P. (Foundry Inspection Program) the selection of 300 foundries for inspection nationwide, the assignment of one general inspection to the Erie area consisting of 17 Pennsylvania counties, as well as a history of prior citations of the Respondent's facility, two old and one current employee reports of violations in particular areas, and the fact that no general inspection of this facility had been made in the past year.

II

The Administrative Probable Cause Issue

1. Because "the Secretary . . . limited his submission . . . to the constitutionality of a warrantless search," (436 U.S. at 325 n. 23), the Court in *Barlow's* did not address with any particularity the question of the standards to govern the validity of warrants for the conduct of OSHA inspections. There are, however, at least three indications that the showing necessary to support a warrant was intended to be one which the Secretary could satisfy without seriously sapping the enforcement effort.

First, *Barlow's* expressly noted that "the Secretary's entitlement to inspect will *not* depend on his demonstrating probable cause to believe that conditions in violation of OSHA exist on the premises" (436 U.S. at 320):

> "Probable cause in the criminal law sense is not required. For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that "reasonable legislative or administrative standards for conducting an inspection are satisfied with respect to a particular [establishment]." *Camara* v. *Municipal Court*, 387 U.S., at 538, 87 S.Ct., at 1736. A warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser division of the area, would protect an employer's Fourth Amendment rights." [436 U.S. at 320.]

Second, the two primary purposes the warrant was said

to serve are to curb the "almost unbridled discretion [of] executive and administrative officers, particularly those in the field, as to when to search and whom to search," and to "advise the owner of the scope and objects of the search." 436 U.S. at 323. These purposes, it would appear, can be met without voluminous warrant applications, adversary hearings, or proof of random selection adequate to satisfy a scientific journal. (But see *Marshall* v. *Weyerhaeuser Co.*, 456 F.Supp. 474, 482, n. 9 (D.N.J.) (concluding that chosing one of eleven companies in a high hazard industry simply because one or another had to be first and not because of any previous "dealing" with the company, is inadequate to support a warrant, suggesting instead, *inter alia*, the use of random number tables).)

Third, *Barlow's* expressly derived the requirement of an administrative warrant from *Camara* v. *Municipal Court*, 387 U.S. 523, and *See* v. *City of Seattle*, 387 U.S. 541. *See* 436 U.S. at 321-322, 324. Those cases characterized the "limitations on administrative action which we think are constitutionally required in the case of investigative entry upon commercial establishments" as "minimal", stressing that:

> "[t]he agency's particular demand for access will of course be measured • • • against a flexible standard of reasonableness that takes into account the public need for effective enforcement of the particular regulation involved." [*See, supra*, 387 U.S. at 545.]

Enunciating the application of this principle to the municipal building code enforcement at stake in *Camara*, the Court noted that:

> "Such standards • • • may be based upon the passage of time, the nature of the building • • • or the condition of the entire area, but they will not necessarily

> depend upon the condition of the particular dwelling." [387 U.S. at 538; *see also id.* at 538, quoting *Frank* v. *Maryland*, 359 U.S. 360, 372 (Douglas, J., dissenting) ("The passage of a certain period without inspection might of itself be sufficient . . . to justify a warrant."]

It would appear, for example, that *Camara* contemplated issuance of a warrant upon an affidavit stating that a decision had been made to conduct a code inspection of all apartment houses, and that the particular building to be searched is an apartment house. That the *Barlow's* majority in fact intended that a warrant application at the same general level of detail would suffice is confirmed by its "doubt that the consumption of enforcement energies in the obtaining of such warrants will exceed manageable proportions." 436 U.S. at 321.[9]

2. Like MSHA (30 U.S.C. § 813(a) and g(1)), OSHA contemplates both routine ("general schedule") inspections and "complaint" inspections triggered by employee reports of unsafe conditions. 29 U.S.C. § 657(a) and (f)(1). While the two categories of inspections have presented somewhat different problems to the lower courts in judging whether the *Barlow's* test for an administrative warrant was met, the developments in both areas have been characterized by employer demands for a level of proof in

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[9] Further confirmation is the suggestion (436 U.S. at 325 n.23) that "the order for inspection that was issued in this case [may have been] the functional equivalent of a warrant." That order was based on an application which only stated generally that the inspection was "part of an inspection program designed to assure compliance with the Act." *Id.* at 323 n.20. That the Court contemplated that such conclusory language might well be sufficient at least indicates that minute review of the details of OSHA's selection process by hundreds of federal magistrates was not intended.

the warrant application far beyond the demonstration we believe *Barlow's* intended. To be sure the few Courts of Appeals which have directly addressed the level of probable cause required have generally reached results we regard as consistent with *Barlow's*. But the trial courts have shown a considerably greater tendency to erect much more stringent standards, with the result that warrant applications have become a major undertaking.

A. *General Schedule Inspections.* Perhaps the leading case at the present time on the showing which must be made to justify a general schedule OSHA inspection, and one which we regard as consistent both with *Barlow's* and with a workable enforcement program, is *Marshall* v. *Chromalloy*, 589 F.2d 1335 (C.A. 7). The pertinent portions of the warrant applicant in that case read as follows:

> 2. The desired inspection is part of an inspection and investigation program designed to assure compliance with the Act in the foundry industry, and is authorized by section 8(a) of the Act.
>
> • • •
>
> 9. Proper entry pursuant to section 8(a)(1) for the aforesaid purposes was attempted by duly authorized compliance officers of the Occupational Safety and Health Administration, United States Department of Labor, on the 19th day of April, 1977, *in the course of a National-Local plan designed to achieve significant reduction in the high incidence of occupational injuries and illnesses found in the metal-working and foundry industry,* but the right of entry was denied by the employer, or an agent of the employer. [*Id.* at 1341, emphasis added.]

As the Court of Appeals noted in upholding this showing as sufficient, the "National-Local plan designed to reduce the 'high-incidence' of occupational injuries in the

'foundry industry' . . . can be viewed as the functional equivalent of *Camara's* 'nature of the [building]' standard." 589 F.2d at 1342.[10]

The objections of the employer in *Chromalloy* to this demonstration of probable cause are not dissimilar from those raised in other cases:

> paragraph 9 . . . does not prove the hazardous nature of either this foundry or the foundry industry. Further, it faults the application for not alleging that the "high' incidence of injuries is the result of violations of OSHA standards. . . . In effect *Chromalloy* asks this court to hold that the Secretary would have to show, every time he wants a warrant, a complete set of updated industry statistics, the validity of these statistics, the rationale for applying a particular index factor to the foundry industry, and the reason for inspecting foundries in lieu of another industry. . . . [589 F.2d at 1342.][10]

Recognizing that to impose such a requirement would "turn a simple warrant request into a full-blown hearing [and] . . . would be imposing on the Secretary an unwarranted 'consumption of enforcement energies' which would

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[10] The Seventh Circuit had earlier rejected as inadequate under *Barlow's* a warrant application which, as here pertinent, simply stated that "[t]he desired inspection is . . . part of an inspection and investigation program designed to assure compliance with the Act and authorized by section 8(a)." *In the Matter of Establishment Inspection of Northwest Airlines, Inc.* 587 F.2d 15, 16-17 (C.A.7). This application, which was made before *Barlow's* (587 F.2d at 17), and appears to have been identical in this respect to that in *Barlow's* itself (p. 12, n.9, *supra*), was distinguished in *Chromalloy*, appropriately in our view, as one which made it "impossible for the magistrate to form a conclusion of reasonableness" (587 F.2d at 1341). Paragraph 9 of the *Chromalloy* application, adding that the industry was a high-risk industry and that a national plan to curb injuries in that indusry had been established, was viewed as entirely sufficient to fill that gap.

'exceed manageable proportions' " 589 F.2d at 1342, the *Chromalloy* court refused to require more than the simple statement contained in paragraph 9.[11]

Other courts, however, even after *Chromalloy* was decided, have acceded to precisely the sort of demands rejected by the Seventh Circuit in that case. For example, in *Matter of Urick Property, supra,* the court agreed that the "voluminous" warrant application explicating the Foundry Inspection Program "has been admirable as far as it goes" (472 F.Supp. at 1195), but refused to issue the warrant because:

> [W]e can find no recital of a rational basis for the selection of the Urick Foundry in the 17 county area in this region. We are told in the Application that Urick has not had a general inspection in the last year but we are not told how many other foundries also fit in this category. We are told of one current and two older violation complaints, but we are not told whether these complaints dictated the choice of Urick Foundry." [*Id.* at 11935.] [12]

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[11] The *Chromalloy* approach has been followed by at least *Stoddard Lumber Co.* v. *Marshall,* 627 F.2d 984, 988 (C.A.9) (rejecting the contention that an establishment in an industry stated to have 1.8 times the national injury rate could require the Secretary in order to justify an inspection "to provide statistics on the company's accident and illness rate, as well as show the company's position on the worst-first list." *Id.*)

[12] See *Marshall* v. *Weyerhaeuser Co.,* 456 F.Supp. 474 (D. N.J.) (a warrant application stating that the establishment is in an industry with an "occupational injury industrial rate of 19.1, indicating a high hazard industry" (*id.* at 478), and also that there had been a "three year time span between inspections" (*id.*), is insufficient because, *inter alia,* "[t]here is no indication of *Weyerhaeuser's* ranking on the list and there is no explanation of the hazard rate which is the controlling factor with respect to rank. . . . There is no information . . . to support the assertions that the Secretary uses the mere passage of time as a standard for conducting inspections." *Id.* at 482.

If the Court in *Barlow's* intended, as we believe, a showing at only the level of detail approved in *Chromalloy*—and if lower courts soon come to so understand, and contentions of the sort raised in *Urick, supra,* and *Weyerhaeuser, supra,* are uniformly and summarily rejected—the capacity for determined employers to forestall inspections and thwart enforcement, outlined in Part I, *supra,* would be substantially eliminated, at least as regards general schedule inspections. If, on the other hand, the *Urick* approach were to prevail—and, indeed, until it is soundly laid to rest—the magnitude of the task of preparing warrant applications for general schedule inspections will preclude routinely obtaining warrants in advance of any inspection attempt, and will make even post-denial warrant proceedings a major diversion of limited enforcement resources.

B. *Complaint Inspections.* In this area, once again, the Seventh Circuit has taken the lead and has adopted an approach which is both consistent with *Barlow's* and, we would think, consistent with the needs of an effective enforcement program. In the companion case to *Chromalloy, supra,* the Seventh Circuit rejected the argument that, while "[p]robable cause in the criminal sense is not required" (*Barlow's, supra,* 436 U.S. at 320) with regard to routine inspections, criminal standards do apply where the basis for the inspection is "specific evidence of an existing violation." *In the Matter of Establishment Inspection of Gilbert & Bennett Manufacturing Co.,* 589 F.2d 1335, 1339 (C.A. 7).[13] As a consequence, that court rejected the contentions that:

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[13] The relevant portions of the warrant application in *Gilbert & Bennett* read:

> 3. The desired inspection is also in response to an employee complaint that employees are required to climb on palletized

"the warrant application [must] set forth the underlying circumstances demonstrating the basis for the conclusions reached by the complainant, or that the underlying circumstances demonstrate a reason to believe that the complainant is a credible person. Nor is there a requirement that the application request be supplemented with a detailed, signed employee complaint." [*Id.* at 1339.]

One might have thought that this definitive holding would have laid to rest, at least in the Seventh Circuit, the question of the application of criminal probable cause standards to health and safety complaint inspections. However, in *Burkart Randall Division of Textron, Inc.* v. *Marshall, supra,* the issue was raised anew, with reliance upon *Michigan* v. *Tyler,* 436 U.S. 499, as supporting the contention. Noting that *Tyler* specifically *rejected* a similar contention and held instead that "entries to investigate the cause of the fire must be made pursuant to the warrant procedures *governing administrative searches*" (436 U.S.

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stock (wire products), which is handled by forklift trucks. Further, the employee complaint alleges that the employer would "climb" (stack) stock as high as necessary. Both items represent potential violations of section 5(a)(1) of the Act which requires employers to furnish to each of his employees employment and a place of employment which are 'free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees' in that, if conditions are as alleged at said employer's plant, employees may be in danger of injury by falling from palletized stock or hit by wire that has been rendered unsafe by stocking it to great heights, among others.

4. There have been four prior inspections of this employer's workplace, each resulting in OSHA compliance officers response to employee complaints, in each case the responding OSHA compliance officer(s) have found and cited the employer for alleged violations of the Act as a result of their inspections. [589 F.2d at 1339.]

at 155, emphasis supplied),[14] the court of appeals adhered to *Gilbert & Bennett* and rejected, *inter alia*, the arguments that the warrant must fail because the employee complaints were not under oath and the application "does not state that the particular compliance officer applying for the warrant personally received the employee complaints or had personal knowledge of the circumstances surrounding

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[14] *Tyler* does contain some elucidation upon the application of the administrative probable cause concept to searches "not programmatic but . . . responsive to individual events." *Id.* at 507. While at least one court has read that passage as possibly sanctioning a full-blown inquiry into the basis for the employee complaint (*In the Matter of C F &I Steel Corp.*, 489 F. Supp. 1302, 1307), that portion of *Tyler*, if applicable at all, would appear instead simply to require—as did the Seventh Circuit in *Weyerhauser Co.* v. *Marshall*, 592 F.2d 373 (C.A. 7)—that a warrant application in a complaint case adds a "few additional facts" to the general statement that "the Secretary had received a written complaint . . . and had determined that there were reasonable grounds to believe that a violation of the Act existed." *Id.* at 378. A statement of what the complaint pertained to, or attachment of the complaint with identifying material excised (*see, e.g., West-Point Pepperell, Inc.* v. *Marshall, supra*, 496 F.Supp. at 1182), ought to suffice.

Further, it is not clear to us that the "individual events" analysis of *Tyler is* here applicable. In *Tyler*, the post-fire inspections were somewhat different in purpose from routine fire inspections, which are enforcement- and prevention-oriented, while post-fire inspections are primarily designed to gather information. As to health and safety complaint inspections, however, the primary purpose of the inspections are identical to those conducted with no knowledge at all of specific violations: to enforce applicable standards in order to *prevent* injuries. Thus, such complaint inspections are best viewed as simply one aspect of the enforcement plan which has been established, in part by specific legislation and in part by regulation. And the decision to concentrate inspection efforts in establishments where there is *some* specific evidence of violation is certainly as "reasonable" as relying on random number tables.

their receipt. . . . [citing] *Marshall* v. *Horn Seed Co.*, 7 OSHC (BNA) 1182 (W.D. Okla.)." 625 F.2d at 1317, 1318 & n. 8.

Once again, however, the understanding of *Barlow's* probable cause standard has not been uniform. For example, one court regarded as inadequate "specific evidence" to support a warrant application affidavits stating that "employees of [the employer] had been killed in the course of their work at these locations, and . . . a total of five employees had been killed on offshore drilling platforms or rigs operated by [the employer] in the preceding nine months." *Marshall* v. *Pool Offshore Co.*, 467 F.Supp. 978, 979 (W.D. La.). *Compare In the Matter of Establishment Inspection of Federal Clearing Die Casting Co., supra,* 484 F.Supp. at 216 (newspaper report that an employee had both hands severed while working on a press at employer's establishment is "specific evidence of an existing OSHA violation."); *Pelton Casteel, Inc., supra,* 588 F.2d at 1188 (fact that there had previously been violations of the Act due to respirable silica and that the employer had endeavored to abate the violations by moving its operations is sufficient to support an inspection to determine whether abatement occurred).

Another court was faced with a warrant application reciting that there had been a number of employee complaints and an employee petition claiming:

> [s]even specific violations of the respirator standards were claimed to be occurring at the mill, including that West Point-Pepperell had not taken steps to ensure proper respirator fit, had failed to evaluate individual employees' ability to wear respirators, had failed to adequately make medical investigations concerning

> employees' compaints about respirators, had failed to transfer workers unable to wear respirators to low dust areas without reducing their pay, had failed to inform its workers about such hazards of cotton dust exposure as byssinosis (a respiratory illness colloquially known as "brown lung" by textile workers), had failed to inform employees of pulmonary test results and other medical data, and had possibly failed to require certain employees to wear the type of mask required for the cotton dust levels they were exposed to. [*West Point-Pepperell, supra,* 496 F.Supp. at 1182.]

While purporting to recognize that even in a complaint situation criminal probable cause standards do not apply, the court proceeded to hold a lengthy hearing (which would not, of course, occur in a criminal case). And the court then concluded that there was no "administrative probable cause to believe that effective OSHA respirator standards were or are being violated" because:

> [t]he evidence revealed that West Point-Pepperell has instituted a comprehensive respirator program, including a medical program to evaluate employees' ability to wear respirators and to handle prysical and psychological complaints stemming from the required wearing of respirators. [footnote omitted] It was also apparent that the Lindale mill does not discriminate against employees who are unable to wear respirators and that it has tried to thoroughly educate its workers on the dangers of cotton dust. The employees' petition to the government indicated at least some familiarity with the disease of byssinosis. . . . Considerable evidence has been presented to the court that West Point-Pepperell is carrying out a plan for monitoring cotton dust levels in its Lindale mill with vertical elutriators, the same testing devices which OSHA seeks to use. The scheme is being conducted in conjunction with changes to plant layout which are expected to alter

> dust levels in various areas of the mill. [*Id.* at 1183-1184.]

Thus, the court in *West Point-Pepperell* in effect held a trial upon whether there were in fact OSHA violations, thereby thwarting the legislative method of determining *by inspection* whether such violations are in fact occurring.

• • • • •

It is possible, of course, that after several more years of extensive litigation, and several more years of relatively widespread employer denials of inspections, the federal courts of appeal, or this Court, will have announced uniform standards similar to those in *Chromalloy* and *Gilbert & Bennett,* and the tendency of employers to demand, and of some courts to require, a massive and enforcement-sapping warrant showing will thereupon cease. In this instance, however, the reciprocal relationship between the degree of burden a warrant entails and the need for any warrant at all, suggests that awaiting the ordinary processes of litigation will not do. Rather, the question whether the *Urick-Weyerhaeuser-Pool Offshore West Point-Pepperell* approach is consistent with *Barlow's* is integral to the decision in *this* case. For, if it is, then the weight in the balance of the governmental need for warrantless searches is greatly increased.

III

The Ex Parte *Warrant Issue*

In additionto its other arguments, the Government in this case, appears to distinguish *Barlow's* on the ground that MSHA "prohibits forcible entries and thus provides a mine operator with an opportunity to obtain immediate judicial review of any special privacy claim." Jurisdictional Statement ("Juris. St.") at 15. *See also Stoudt's*

Ferry Prep. Co., supra, 602 F.2d at 594; *Texoline Co., supra,* 612 F.2d at 937. This suggestion is inaccurate if intended as a statement of what MSHA *requires.*[15] As a statement of agency policy, we find it quite troublesome, for a similar statement of policy made in the *Barlow's* litigation has been the basis for precluding *ex parte* warrants and requiring lengthy adversary proceedings.

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[15] Unlike OSHA, MSHA *does* expressly authorize an action to enjoin refusals to permit inspections 30 U.S.C. § 818 (a)(1). But, nowhere in the statute—or, so far as we are aware, its legislative history—is there any intimation that resort to such court action is the exclusive means contemplated by Congress for enforcing the entry right granted by 30 U.S.C. § 813(a). Section 818(a), to be sure, does not so state; that section says only that the Secretary under that section "*may* institute a civil action for . . . a permanent or temporary injunction" if entry is refused (emphasis supplied). And, as the court below in this case pointed out, refusal of entry are a violation of the Act which can result in substantial civil monetary penalties. Juris. St. App. at 5a.

Further, any suggestion that the Act may *require* an adversary injunctive proceeding if entry is refused would appear to be inconsistent with the statute's command that for two of the four categories of inspections provided for by the Act, "no advance notice of an inspection shall be provided to any person." 30 U.S.C. § 813(a). That "the Secretary . . . may give advance notice of inspections" held for information gathering rather than enforcement purposes (*id.*) explains in part the role of § 818(a)(1). In addition, it may be appropriate in some instances to seek a permanent, long-term injunction against an employer mandating entry whenever inspection is sought rather than an injunction pertaining to a single inspection. But, any information that MSHA *requires* an adversary proceeding before entry for enforcement inspections may be compelled is one which, in our view, is without support in the statute. Finally, the section may have been included simply to assure that there is jurisdiction over an injunctive action if the Secretary in individual instances determines that such is preferable. *Compare Marshall* v. *Gibson's Products, Inc.,* 584 F.2d 668 (C.A. 5); *Marshall* v. *Shellcast Corp.,* 592 F.2d 1369 (C.A. 5) (no jurisdiction over injunctive suit to compel OSHA inspection.)

In *Barlow's*, the Secretary, in what was later termed a "litigation strategy" (*Cerro Metal Products* v. *Marshall*, 620 F.2d 964, 976 n. 32; *id.* at 984 (Seitz, J., dissenting), made quite a similar representation to the Court. The Department's practice in the event of refusals of entry, said the Secretary, was to institute a civil action in federal court seeking an order compelling entry. 436 U.S. at 318 n. 14.

The proceeding which actually occurred in *Barlow's* itself, in fact, seems identical to that which the Secretary claims to be contemplated by MSHA. In *Barlow's* the Secretary filed an "Application for Affirmative Order to Grant Entry and for an Order to Show Cause why such affirmative order should not issue." *Id.* at 318 n. 14. By issuing the order to show cause (*id.*) the District Court necessarily afforded the employer the right to appear. The *Barlow's* Court relied upon this representation as an indication that such a proceeding was not inconsistent with the effective enforcement of the Act, noting that "[i]f this safeguard endangers the efficient administration of OSHA, the Secretary should never have adopted it." 436 U.S. at 320.

The Secretary later recognized, however, that with regard to OSHA the resort to adversary process in the period immediately preceding *Barlow's*[16] had not been conducive to effective enforcement of the Act. *See* 45 Fed. Reg. 65916 (Oct. 3, 1980), amending 29 CFR 1903.4. The Secretary noted that "the structure and fundamental policies of the Act mandate that inspection warrants be

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[16] Earlier, the Secretary had in some instances sought "a warrant . . . before the inspection is attempted." *Barlow's* 436 U.S. at 318 n.13, quoting Dept. of Labor, OSHA Compliance Operations Manual V-7 (Jan. 1972).

obtained *ex parte* . . . [because of] the fundamental importance of unannounced inspections." 45 Fed. Reg. at 65918. Further, OSHA reported that adversary proceedings led to "[s]ignificant delays in obtaining warrants" (*id.* at 65919) [17] and, both because "the adversary hearing is likely to consume several days trial time" (*id.*) and because "OSHA personnel would be required to be present in order to testify" (*id.*) to a severe "drain [on] the agency's scarce enforcement resources." *Id.*

The Secretary's efforts to alter the mode of obtaining *ex parte* process to that prevalent in criminal proceedings were, however, met with the objection that the Secretary's own regulations contemplated adversary proceedings. *Marshall* v. *W&W Steel Co.*, 604 F.2d 1322 (C.A. 10); *Cerro Metal Products* v. *Marshall*, 620 F.2d 964 (C.A. 3); *Stoddard Lumber Co.* v. *Marshall*, 627 F.2d 984 (C.A. 9). One court of appeals agreed with this proposition (*Cerro Metal Products, supra*), viewing *Barlow's* as supporting this reading of the applicable regulations. The result was, predictably, that adversary process was widely demanded, at least until the recent promulgation of a revised version of 29 C.F.R. § 1903.4. 45 Fed. Reg. 65916. Given this background, this Court's decision in the present case should take directly into account the demonstrated need for warrants, if such there are to be, to be issued *ex parte*, whatever the Secretary may now be suggesting in order to avoid any warrant requirement whatever.

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[17] An extensive administrative record was compiled by OSHA concerning the proposed amendment. In particular, OSHA gathered from all regional offices of the "Solicitor of Labor information on experience with adversary proceedings both before and after *Barlow's*. *See* Ex. 3-1 et seq.

CONCLUSION

For the reasons stated above, the judgment below should be reversed. If, however, warrants are indeed deemed necessary under the Fourth Amendmnt, this Court should make clear that such warrants may consistently with MSHA be issued *ex parte* and upon a showing with a minimum of detail of the existence of an inspection plan covering the establishment or of a complaint or other indication of safety hazards which could violate the Act.

Respectfully submitted,

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No. 80-901

In the

Supreme Court of the United States

FILED
APR 10 1981
ALEXANDER L. STEVAS
CLERK

OCTOBER TERM, 1980

Raymond J. Donovan, Secretary of Labor
United States Department of Labor,

Appellant,

versus

Douglas Dewey and
Waukesha Lime and Stone Company,

Appellees.

On Appeal from the United States District Court
For the Eastern District of Wisconsin

BRIEF OF KENT NOWLIN CONSTRUCTION, INC. AND THE NEW MEXICO READY MIX AND SAND AND GRAVEL ASSOCIATION, AMICUS CURIAE, IN SUPPORT OF APPELLEES.

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INTEREST OF AMICUS CURIAE[1]

This case presents the question of whether the Mine Safety and Health Act of 1977, 30 U.S.C. Section 801, *et. seq.*, is unconstitutional insofar as it purports to permit warrantless inspections contrary to the Fourth Amendment.

[1]The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court pursuant to Rule 36.2 of the Rules of this Court.

Kent Nowlin Construction, Inc., and members of the New Mexico Ready Mix and Sand and Gravel Association, operate sand and gravel operations. These sand and gravel operations are similar in that persons employed by the companies scoop up, with the use of rubber tired front end loaders, loose surface sand and gravel. This sand and gravel is thereafter loaded into dump trucks and transported a short distance to a screening-crushing operation where it is screened and sized for various uses such as road beds, in concrete, in asphalt and in childrens' sand boxes. Amicus are not licensed as a condition of entering into the sand and gravel business.

Kent Nowlin Construction, Inc., as well as all sand and gravel operators of the New Mexico Ready Mix and Sand and Gravel Association are subject to inspections by the Mine Safety and Health Administration pursuant to Section 103(a) of the Mine and Safety and Health Act of 1977, 30 U.S.C. §813 (a).

Kent Nowlin Construction, Inc., and Valley Transit Mix, Inc., Rose Gravel Company, Wallach Concrete Products, Inc. and Arco Materials, Inc., who are members of the New Mexico Ready Mix and Sand and Gravel Association, have denied entry to MSHA inspectors when those inspectors have sought to conduct warrantless inspections.

As a result of denying entry to MSHA inspectors, the above companies have cases now pending before the United States Court of Appeals for the Tenth Circuit over the issue of whether the Mine Safety and Health Act is unconstitutional insorfar as it purports to permit warrantless inspections of sand and gravel operations, i.e., are sand and gravel operations pervasively regulated. In all of these cases briefing is complete and argument has been heard. The Tenth Circuit has advised all parties that it will not decide their cases until this Court rules in the *Douglas Dewey and Waukesha Lime and Stone Company* case. The numbers of the Tenth Circuit cases are 80-1334, 79-2034 and 80-1027.

In all likelihood, the decision rendered by the Supreme Court in the *Dewey* case will also decide the cases before the

Tenth Circuit. There are factual similarities between the *Dewey* case and the Tenth Circuit cases. The Tenth Circuit cases involve no blasting but do involve loading material onto a truck by a mechanical loader and transporting that material to a screening and crushing facility where it is processed. Additionally, in contrast with the *Dewey* case, the Tenth Circuit cases involve an exhaustive trial record including numerous statistical exhibits published by the Department of Interior and the Department of Labor which conclusively established that sand and gravel operations, limestone operations and mining operations are not as dangerous as many industries regulated by OSHA. Therefore, there exists no special governmental interest which would create pervasive regulation which inturn would create an exception to the warrant requirements of the Fourth Amendment.

The Court below, properly invalidated the Mine Safety and Health Act in that the limestone industry is not pervasively regulated.

SUMMARY OF ARGUMENT

Limestone quarries, sand and gravel operations, surface operations and underground mines are all separate industries and cannot be categorized with underground coal mines. Further, these industries, other than underground coal, have no long history or regulation, are not licensed by the federal government and have injury rates which are below many of the types of industries throughout the United States. Therefore, it cannot be said that limestone quarries, sand and gravel operations, and other extraction operations are pervasively regulated so that a search warrant is unnecessary prior to inspection of these companies' premises by government agents.

The purposes of the Mine Safety and Health Act of 1977 and the Occupational Safety and Health Act of 1970 are the

same, i.e. the protection of workers. Neither Act places limits on the number of inspections which may be conducted by government agents. The Occupational Safety and Health Act provides limits in terms of reasonableness which the Mine Safety and Health Act does not provide. This Court in *Marshall v. Barlow's Inc.*, 436 U.S. 507 (1978) held the warrantless search provisions of the Occupational Safety and Health Act to be unconstitutional and likewise should hold the warrantless provisions of the Mine Safety and Health Act to be unconstitutional.

ARGUMENT

I

THE MINE SAFETY AND HEALTH ACT OF 1977 IS UNCONSTITUTIONAL INSORFAR AS IT PERMITS WARRANTLESS INSPECTIONS OF LIMESTONE QUARRIES AND SAND AND GRAVEL OPERATIONS IN THAT THESE OPERATIONS ARE NOT PERVASIVELY REGULATED.

In litigation country wide over the past two years[2] the Secretary of Labor has basically made a three pronged attack at the various companies who have resisted warrantless inspections. First, the Secretary has attempted to make out a case for pervasive regulation by aligning limestone quarries and sand and gravel operations with underground coal mining and the history of coal mining regulation. Second, the Secretary has attempted to create pervasive regulation by legislative history of alleged dangers in limestone quarries and

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[2] *Marshall v. Nolichuckey Sand Co., Inc.*, 606 F. 2d 693, cert. denied, 446 U.S. 908, *Marshall v. Sink*, 614 F. 2d 37, *Marshall v. Stoudt's Ferry Preparation Co.*, 602 F. 2d 589, cert. denied, 444 U.S. 1015, *Marshall v. Texoline Co.*, 612 F. 2d 935, and *Marshall v. Wait*, 628 F. 2d 1255.

sand and gravel operations and through statistics and data purportedly showing inherent danger in those operations. Third, the Secretary has attempted to create pervasive regulation by legislative fiat, i.e. if congress says something should be pervasively regulated then it is in fact pervasively regulated. The effect of this third argument is that congress can circumvent the search provisions of the Fourth Amendment by merely declaring an industry, or segment of an industry, pervasively regulated regardless of fact and truth.

It is clear that industries regulated by OSHA are numerous involving nearly the entire spectrum of enterprise, and that the industry regulated by MSHA involves a comparatively narrow space on the industry spectrum. The Secretary argues that because of this, warrantless inspections are permissible in the narrow space occupied by MSHA, thus MSHA's regulation is pervasive.

This reasoning by the Government however misses the point. What must be examined by comparison is what OSHA regulates and what MSHA seeks to regulate. *Amicus* uses the word "seeks" because MSHA is unclear as to it regulation and has given up some of the spectrum to OSHA as indicated by an MSHA-OSHA Interagency Agreement.[3] In this agreement these agencies sought to determine the constitutional issue before this Court in that they sought to determine which types of operations would be subject to warrantless inspections and which operations would be subject to the requirements of a warrant under OSHA. Examples of the incongruity of this approach are found in the Agreement. Under Section A(3) of the Agreement, if there were no MSHA standards applicable, then OSHA would apply. This is stated as follows:

> "...(O)r where there is statutory coverage under the Mine Act but there exist no MSHA standards applicable to particular

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[3]44 FR 22827, April 17, 1979; effective March 29, 1979

> working conditions on such sites, then the OSHA Act will be applied to those working conditions."

This, when reduced to it clear meaning, says that if MSHA had never adopted standards or regulations, then all OSHA standards or regulations would apply and OSHA would act. Ergo, a warrant would be required.

With regard to what OSHA regulates, the Court is reminded of just a few examples: oil well drilling, tunnel drilling and excavation, sky scraper (steel) erection, bridge building, trench digging, dam building, power plant construction, mills, machine shops and an entire range of other industry including chemical plants, etc.

By Comparison, MSHA regulates "coal or other mine(s)". This includes underground mines where coal, gold, silver, and other minerals are mined as well as surface mines where those same minerals are mined. Also included are quarries, such as limestone quarries, and sand and gravel operations.

A comparison betwen the above industries regulated by OSHA and limestone quarries and sand and gravel operations regulated by MSHA reveals a most troublesome inconsistency. That inconsistency is that the Secretary is saying that limestone quarries and sand and gravel operations are pervasively regulated but that tunneling through a mountain or building a tunnel under water is not pervasively regulated.

One of the tests which the government uses to attempt to make a case for pervasive regulation is the danger of the industry involved. Yet, it cannot be reasonably aruged that limestone quarrying and sand and gravel operations are more dangerous than tunneling through a mountain, drilling for oil, working in a steel mill and so on, this will be conclusively shown below. Thus, it cannot be said that by the insertion of the words "and other mines" in the Federal Mine Safety and Health Act of 1977 that limestone quarries and sand and gravel

operations are now pervasively regulated and thus subject to warrantless inspections.

In order to understand that OSHA regulation and MSHA regulation are really no different, a comparison of the language in several Federal Acts is important.

We first examine the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, *et. seq.* That Act states in part as follows:

> §651
>
> (a) The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.
>
> (b) The Congress declares it to be its purpose and policy...to assure so far as possible every working man and women in the Nation safe and healthful working conditions and to preserve our human resources....
>
> (3) By authorizing the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce.....
>
> §654
>
> (a) Each Employer -
>
> (1) Shall furnish to each of his employees employment and a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;...

By way of comparison, the Federal Mine Safety and Health Act of 1977, 30, U.S.C. §801, *et. seq.* contains the following language, in part:

§801 Congress declares that -

(a) the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource-the miner;

(b) death and serious injuries from unsafe and unhealthful conditions and practices in the coal or other mines cause grief and suffering to miners and their families;

(c) there is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's coal or other mines....

(d) the existence of unsafe and unhealthful conditions and practices in the Nation's coal or other mines is a serious impediment to the future growth of the coal or other mining industry....

§811

(a) The Secretary shall...develop, promulgate, and revise as may be appropriate improved mandatory health or safety standards for the protection of life and prevention of injuries in coal or other mines.

The most interesting comparison is that between the Federal Mine Safety and Health Act of 1977 and its predecessor the Coal Mines Health and Safety Act of 1969 found at 30 U.S.C. §801 *et. seq.* in the 1976 edition of the Code. Language of the 1969 Act is similar to the 1977 Act except for the obvious distinction that the language "other mining industry" or "other mines" is missing. For example, the following is language from the 1969 Act.

§801 Congress declares that -

(a) The first priority and concern of all in the coal mining industry must be the health and safety of its most precious resource-the miner;

(b) deaths and serious injuries from unsafe

> and unhealthful conditions and practices in the coal mines cause grief and suffering to the miners and to their families;
>
> (c) there is an urgent need to provide more effective means and measures for improving the working conditions and practice in the Nation's coal mines....
>
> (d) the existence of unsafe and unhealthful conditions and practices in the Nation's coal mines is a serious impediment to the future growth of the coal mining industry.
>
> §811
>
> (a) The Secretary shall...develop, promulgate, and revise, as may be appropriate, improved mandatory safety standards for the protection of life and the prevention of injuries in a coal mine....

Limestone quarries and sand and gravel operations had some limited federal regulation under the Metal and Nonmetallic Mine Safety Act of 1966, 30 U.S.C. §721 *et. seq.* Language in the 1966 Act bears little resemblance to the above legislation and while concerned with protection of life and the promotion of health and safety does not speak in terms of urgent needs as does MSHA or substantial burdens as does OSHA.

The point of the above comparison is twofold. First, by Congress adding the words "other mining industry" or "other mines" to the 1977 Act does not mean those other "mines" fall into the category of coal mines in terms of regulation or history of regulation. By merely adding "other mines" to regulation does not mean those "mines" are thus pervasively regulated so as to make a warrant unnecessary. As shown by the MSHA-OSHA Interagency Agreement, *supra*, many of those "mines" are not mines at all but rather are more akin to earth moving operations in the construction industry.

Second, the comparison between the Federal Mine

Safety and Health Act of 1977 and the Occupational Safety and Health Act of 1970 reveals that the purpose of Congress in both Acts is the same, that is to provide an injury free place to work so as to protect the country's precious human resources. Because the industries regulated by OSHA cannot really be distinguished from those regulated by MSHA with perhaps the exception of underground coal mines, which emit lethal and explosive methane gas and have a lengthy history of regulation, *Youghiogheny & Ohio Coal Co. v. Morton*, 364 F. Supp. 45 (S.D. Ohio, 1973), it cannot be said that limestone quarries and sand and gravel operations are pervasively regulated.

It is interesting to note that in the Secretary's opening brief reference is made to certain Senate reports as to the congressional intent of MSHA. This is not a new tactic for the Government. In the Government's brief in *John T. Dunlop, Secretary of Labor v. Hertzler Enterprises, Inc., d/b/a Sandia Die and Cartridge Co.*, 418 F. Supp. 627 (D.C. New Mexico, 1976) a case that predated *Marshall v. Barlow's Inc.* 436 U.S. 507, (1978) and also held warrantless inspections in non pervasively regulated industries to be unconstitutional, the government made the following quotation from a Senate report.

> The problem of assuring safe and healthful workplaces for our working men and women ranks in importance with any that engages the national attention today...14,500 persons are killed annually as a result of industrial accidents...during the past four years more...than in the Vietnam war. By the lowest count 2.2 million persons are disabled on the job each year, resulting in the loss of 250 million man days work.
>
> ...In addition to the individual human tragedies involved the economic impact of industrial deaths and disability and the annual loss to the Gross National Product is estimated to be over $8 billion. Vast

> resources that could be available for productive use are siphoned off to pay workmen's compensation benefits and medical expenses. (And this) "grim current scene"...represents a worsening trend, for... the number of disabling injuries per million man hours worked is today 20% higher than in 1958. (Committee Print, LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1977, 92nd Cong. 2st Sess. 142 (1971) (Senate Report) Accord: LEG. HIST. 143-145 (Senate Report), 844-846, 857, 865 (House Report). Citations to the legislative history are selective rather than exhaustive.)

By citing this legislative history, the government in *Hertzler* argued that there could be little doubt that OSHA's inspection provisions were designed to implement an "urgent Federal interest" in the area of occupational safety and health. The government then quoted the following language from the Senate Report for the proposition that Congress considered swift unannounced inspection, unemcumbered by warrant requirement, essential to the administration of OSHA.

> In order to carry out an effective national occupational safety and health program, it is necessary for government personnel to have the right of entry in order to ascertain the safety and health conditions and status of compliance of any covered employing establishment. Section 8(a) therefore authorizes the Secretary or his representative, upon presenting appropriate credentials, to enter at reasonable times the premises of any place of employment...to inspect and investigate within reasonable limits all pertinent conditions.
>
> ***
>
> Essential to the effective enforcement of this Act is the premise that employers will not be forewarned of inspection...Experience under the Walsh-Healey Act

> has indicated that the practice of advance notice to an employer has been a prime cause of the breakdown in that statute's enforcement..... *Id.*

History speaks for itself. Neither the District Court for the District of New Mexico nor this Court in *Barlow's* was impressed with this argument.

Turning now to the legislative history of the Federal Mine Safety and Health Act of 1977, let us see what, if anything, Congress thought of it's penalty and warrantless search provisions as finally adopted under MSHA. In a colloquy between Senator Schweiker and Senator McClure, during the Senate floor debate, we again see examples of the onerous approach of MSHA as adopted and the attitude of many of the members of Congress regarding their obligation to pass constitutionally sound legislation. The Court is directed to page 1075 of the legislative history where the following occurs:

> "Mr. Schweiker. Mr. President, if the Senator will yield. I would like to give him another thought on those $10,000 kinds of fines. All they do is go to court, appeal and delay and appeal and delay, and that has sometimes gone on for years.
>
> So even a $10,000 fine does not mean much except an item on a court docket, until the mine goes up in an explosion.
>
> Mr. McClure. **So what the Senator is saying is that instead of enforcement under the law, we will turn it over to the rump process outlines here, where the inspector can do what he jolly well pleases, and the operator will have no rights at all?** (Emphasis added.)

In the same debate, Senator McClure in specifically referred to the penalty provisions under MSHA by which an inspector cannot only establish patterns of violations but can order mandatory shutdowns, said the following:

> **"If the inspector is motivated right and his motives are pure and he wears nothing but a white hat and he is always on the right side of God and grace, he will never violate that discretion, will he?**
>
> But if he does not have that kind of character, if he is not motivated in that manner, he can, if he wishes to, operate in quite a different manner under this bill.
>
> Do not come back at me, and say, yes, but people die. I know that. I know there are people that die in mines, and I want to stop it just as much as the Senator from Pennsylvania does. **But does that justify a departure from the usual rules in our society that a person is entitled to due process; that he is entitled to a presumption of innocence until proven guilty; that he is entitled to protect himself in the courts, rather than have to submit himself to the arbitrary discretion of the bureaucracy?**
>
> I think it has already been established that there were adequate tools under the existing law to deal with this question. The only problem is that they have not been used. That, I understood the Senator from New Jersey say, was the reason for the new legislation, because the old law was not being enforced - not because the old law was inadequate.
>
> I have not heard anybody tell me that. But the old law was not being enforced; therefore, **we must establish a star-chamber proceeding in which there are no rights on one side; in which the abuse of power that can be marshaled under this can become both oppressive and confiscatory."** (Emphasis added.)

In the floor debate in the House of Representatives, Congressman Santini rhetorically posed the question that is before this Court when he said:

> "...Do we solve the need for safety in our mines by compounding the problems that have inhered in the

> general administration at the street and business level of the OSHA? Are we creating a baby OSHA? Are we creating and compounding the problems that have occurred because the judge-jury-executioner general authority that has been implanted within OSHA by bringing that judge-jury-executioner authority and putting it in our mines?" (Leg. History of FMSHA of 1977, p. 1219).

Beyond all the legislative history, it is not for Congress to tell this Court the meaning of the Fourth Amendment to the Constitution. One of our greatest freedoms will certainly be eroded if warrantless searches are allowed to be made on local limestone quarries and sand and gravel operations, operations which bear absolutely no element of pervasive regulation because there exists no lengthy history of regulation, no licensing, and no legitimate, urgent interest by high injury rates. *Colonnade Catering Corp. v. United States,* 397 U.S. 72(1970); *United States v. Biswell,* 406 U.S. 311 (1972).

That limestone quarries and sand and gravel operations are not pervasively regulated is further shown by the MSHA-OSHA Interagency Agreement, *supra.* That Agreement delineates certain areas of authority as between areas regulated by MSHA and OSHA and states in pertinent part as follows:

> 6. Pursuant to the authority in section 3(h)(1) to determine what constitutes mineral milling considering convenience of administration, the following jurisdictional determinations are made:
>
> a. MSHA jurisdiction includes salt processing facilities on mine property; electrolytic plants where the plants are an intergral part of milling operations; stone cutting and stone sawing operations on mine property where such operations do not occur in a stone polishing or finishing plant; and alumina and cement plants.
>
> b. OSHA jurisdiction includes the following whether or not located on mine property; brick, clay

pipe and refractory plants; ceramic plants; fertilizer product operations; concrete batch, asphalt batch, and hot mix plants; smelters and refineries. OSHA jurisdiction also includes salt and cement distribution terminals not located on mine property, and milling operations associated with gypsum board plants not located on mine property.

7. "Borrow Pits" are subject to OSHA jurisdiction except those borrow pits located on mine property or related to mining. (For example, a borrow pit used to build a road or construct a surface facility on mine property is subject to MSHA jurisdiction). "Borrow Pit" means an area of land where the overburden, consisting of unconsolidated rock, glacial debris, or other earth material overlaying bedrock is extracted from the surface. Extraction occurs on a one-time only basis or only intermittently as need occurs, for use as fill materials by the extracting party in the form in which it is extracted. No milling is involved, except for the use of a scalping screen to remove large rocks, wood and trash. The material is used by the extracting party more for its bulk than its intrinsic qualities on land which is relatively near the borrow pit.

What this Agreement recognizes is that certain mining or mining related activities are not mining at all. What is the real difference between a "borrow pit" and screening operation over which OSHA has jurisdiction and the sand and gravel operations of *Amicus*? *Amicus* submits that there is none and further submits that by merely calling an industry an "other mine" does not make it a mine, does not make it pervasively regulated and does not take it out of Fourth Amendment protections.

It cannot be said that there is a governmental interest in regulating limestone quarries and sand and gravel operations because of high incidence of injuries and that high injury

frequency creates pervasive regulation.

In his brief, the Secretary cites to the Court various findings and reports, which purport to show that the "mining" industry is unusually dangerous and hazardous, so much so, that the government is thereby justified in conducting warrantless inspections of limestone quarries and sand and gravel operations. This argument is erroneous.

First of all, the dangerous working conditions of a particular industry *are not* a test for determining whether warrantless inspections are justified. OSHA, just like MSHA, was enacted out of concern for the nation's working force. In *Barlows's*, the Secretary cited to the Court numerous statistics and Congressional reports purporting to show the dangerous and hazardous working conditions of American industry; conditions allegedly so bad that a scheme or warrantless inspections was necessary and reasonable to correct these conditions. Yet in *Barlow's* this Court held that a warrant was required before an inspection could take place under OSHA.

Secondly, the limestone quarrying and the sand and gravel industries are **no more dangerous** than numerous industries which are regulated under OSHA, where warrants are required prior to inspections.

Attached as Addendum "A" to this brief are excerpts from a statistical compilation entitled Bureau of Labor Statistics Report No. 360, "Injury Rates by Industry, 1966 and 1967." As can be seen from these government statistics, the injury frequency rate (number of disabling injuries per million employee hours worked) for the sand and gravel industry was 19.1. For the coal mining and preparation industry it was 42.9. Some of the industries with high injury frequency rates, and which are regulated under OSHA, where warrantless inspections were held unconstitutional are: poultry dressing and packing 42.0; knit fabric mills 21.6; saw mills and planing mills 36.9; wood household furniture 20.5; Glue and gelatin 23.4; leather tanning and finishing 37.0; games and toys 21.1; general contractors 304; plumbing, heating and air

conditioning 24.4; trucking, local and long distance 31.7; groceries and related products 21.3; refuse collection and disposal and other sanitory services 70.0.

Attached as Addendum "B" to this brief are excerpts from a compilation entitled Bureau of Labor Statistics Report 460. "Chartbook on Occupational Injuries and Illnesses, 1974." As can be seen from this compilation, the non-metallic mineral industry (which would include limestone quarries and sand and gravel operations) had an occupational injury and illness incidence rate per 100 full-time workers of 6.8 in 1974, and 7.0 in 1973. The Court is again invited to compare this to other OSHA regulated industries: logging camps 29.2 in 1974; blast furnaces and steel mills 13.4 in 1974; malt liquor 21.4 in 1974, etc.

Attached as Addendum "C" to this brief are excerpts from a compilation entitled Bureau of Labor Statistics Report No. 561, "Occupational Injuries and Illnesses in 1977: Summary". Again, the non-metallic mineral industry had an occupational injury incidence rate, per 100 full time workers of 5.0 in 1976 and 5.1 in 1977. Again the Court is invited to compare this to OSHA regulated industries, where warrants are required prior to safety and health inspections: highway and street construction 14.3 in 1976 14.8 in 1977; mill work 22.0 in 1976 and 1977, etc.

Attached as Addendum "D" to this brief are excerpts from statistical compilation from the National Safety council, entitled "Accident Facts, 1976 Edition." An examination of excerpts from this report reveals that most accidents are accidents which occur within the home or are vehicular accidents. Beyond this most disaster deaths are caused not in mines but by natural disasters or in shipping, air, railroad, fire, or explosion disasters. Industries involved in these disasters are regulated by agencies other than MSHA.

Analysis of these documents clearly lays to rest any assertion by the Secretary that limestone quarries and sand and gravel operations are excessively dangerous and

hazardous, such that warrantless inspections are necessary and reasonable under the circumstances. In light of this hard, factual evidence, the Secretary's overriding governmental interest, need, and concern proves to be an illusion.

Amicus asserts that what might be justified for underground coal mines, is not justified for limestone quarries and sand and gravel operations simply because Congress has elected to dump many different industries together under a broad definition of a "mine". Administrative convenience does not justify stripping the Fourth Amendment rights away from limestone quarries and sand and gravel operations, which have never been pervasively regulated. The Secretary argues that *Barlow's* can be distinguished from this case because MSHA relates to a specific industry, whereas OSHA sought to regulate all of American industry. However, as established above, MSHA does not related to a single industry. Like OSHA it relates to many different and distinguishable industries. Limestone quarries, sand and gravel operations, surface operations and underground mines are all separate and cannot be categorized with underground coal mines.

II.
THE MINE SAFETY AND HEALTH ACT OF 1977 DOES NOT PROVIDE A REGULATORY SCHEME WITH SUFFICIENT SAFEGUARDS SO AS TO PRECLUDE A WARRANT BEFORE INSPECTION BY GOVERNMENTAL AGENTS.

Section 103(a) of the Mine Safety and Health Act of 1977 reads in part as follows:

> Sec. 103 (a) Authorized representatives of the Secretary of Health, Education and Welfare shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information

relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection, the Secretary of Health, Education and Welfare may give advance notice of inspections. In carrying out the requirements of clauses (3) and (4) of of this subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year (30 U.S.C. (Supp. II) 813 (a)).

Section 8(a) of the Occupational Safety and Health Act of 1970 reads as follows:

Sec. 8(a) in order to carry out the purpose of this Act, the Secretary, upon presenting appropriate credentials to the owner, operator or agent in charge, is authorized --

(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace, or environment where work is performed by an employee of an employer; and

(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner,

> any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein and to question privately any such employer, owner, operator, agent or employee (29 U.S.C. 657 (a) (1) (2)).

After a comparison between these two inspection schemes, it cannot be reasonably argued that the inspection provisions of Mine Safety and Health Act are any more reasonable than the inspection provisions of the Occupational Safety and Health Act which this Court held in *Barlow's* could be carried out only after OSHA inspectors acquired a search warrant. Indeed, *Amicus* submits that the inspection provisions under OSHA are more reasonable (are more limited) than the inspection provisions under MSHA.

OSHA permits inspections only at "reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment..." MSHA has no comparable reasonableness. Rather, MSHA allows inspections at any time for "obtaining" and "gathering information", and determining "compliance" with the Act. Under neither MSHA or OSHA are limitations placed on the maximum frequency of inspections. *Amicus* would point out that MSHA does provide for a minimum of four annual inspections for underground mines and two annual inspections for surface mines. These provisions cannot be characterized as safeguards. There is no language which limits MSHA from inspecting operations such as limestone quarries and sand and gravel operations every week or for that matter every day.

It cannot be reasonably argued that the Occupational Safety and Health Act and the Mine Safety and Health Act can be distinguished because the Occupational Safety and Health Act includes a general duty clause and the Mine Safety and Health Act does not, and therefore that the Mine Act provides a reasonable regulatory scheme which requires no warrant and the OSH Act does not.

Section 5 (a) of the Occupational Safety and Health Act

(29 U.S.C. 654 (a) (1)) states as follows:

> "Sec. 5. (a) Each Employer -
>
> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;"

Section 6 of the Occupational Safety and Health Act then directs the Secretary of Labor to establish such safety and health standards to protect employees from hazards which are likely to cause death or serious physical harm.

Section 2(g) of the Mine Safety and Health Act (30. U.S.C. Supp. II 801 (g)) states in part as follows:

> "(g) it is the purpose of this Act (1) to establish interim mandatory health and safety standards and to direct the Secretary of Health, Education and Welfare and the Secretary of Labor to develop and promulgate improved mandatory health or safety standards to protect the health and safety of the Nation's coal or other mines; (2) to require that each operator of a coal or other mine and every miner in such mine comply with such standards..."

Query? What is the difference between these two pieces of legislation? They both speak of protecting employees through promulgation of standards. One is not drafted more narrowly or tighter than the other. The Court cannot reasonably require a warrant under one piece of legislation (OSHA) but not the other (MSHA).

III.
COURT OF APPEALS DECISIONS UPHOLDING THE CONSTITUTIONALITY OF THE INSPECTION PROVISIONS OF THE MINE SAFETY AND HEALTH ACT ARE ERRONEOUS

To date, the Third, Fourth, Fifth and Sixth Circuit Courts of Appeals have held for the position of the Secretary that the Mine Safety and Health Act is not unconstitutional insofar as it provides for warrantless searches. *Amicus* submits that each of those cases is either defective or is distinguished from the instant case. For instance, the Sixth Circuit in *Marshall v. Nolichuckey Sand Co., Inc.*, 606 F. 2d 693, cert. denied, 446 U.S. 908, held as follows:

> "The sand and gravel industry does not have the long history of regulation referred to in *Colonnade* or the extensive licensing scheme which was present in both *Colonnade* and *Biswell.* Nevertheless, as Congress found, all miners are exposed to unusually severe health and safety hazards. We believe it was reasonable to bring all mineral extraction business and operations under a single regulatory act. This is especially true for sand and gravel operations in light of statistics before Congress in 1966 which 'conclusively show that the sand and gravel industry is the most hazardous except for the underground coal and mineral mining industries.' S. Rep. No. 1296, 89th Cong. 2nd Sess., reprinted in 1966 U.S. Code Cong. 2nd Adm. News, p. 2851."

The error made by the Sixth Circuit in *Nolichuckey* is obvious. The Court relied on a statement of Congress as quoted in the Secretary's brief without examining the actual statistical facts. *Amicus* has provided those facts to this Court unlike Nolichuckey Sand Co. which did not present such facts to the Sixth Circuit. This Court should thus be able to avoid the pitfall of the Sixth Circuit. In light of the statistical facts it

cannot be said that the limestone quarrying or sand and gravel industry is the most hazardous except for the underground coal and mineral mining industries. Therefore, the Secretary cannot maintain an argument that there is a governmental interest in regulating limestone quarries and sand and gravel operations because of high incidence of injuries and that high injury frequency creates prevasive regulation. This Court will note that the Sixth Circuit held that there was no creation of pervasive regulation of sand and gravel operations under the *Colonnade-Biswell* exceptions because of the lack of licensing scheme and long history of regulation.

The Sixth Circuit further erred in holding in the second to the last paragraph of its decision that, "Finally, refusal of an operator to permit an inspection does not lead to summary imposition of sanctions." This is not the case. Sanctions in the form of monetary fines have been levied against *Amicus* for their refusal of entry to MSHA inspectors. Under the administrative system fines must be imposed for every citation inspectors write. Fines can be up to $10,000 in amount.

Section 110(a) of the Mine Safety and Health Act states as follows:

> "The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by The Secretary which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense." (30 U.S.C. §820 (a))

It thus becomes the duty of this Court to correct the error made by the Sixth Circuit in *Nolichuckey* and perpetuated by the Fifth Circuit in *Marshall v. Texoline Company*, 612 F. 2d 935. In *Texoline*, the Fifth Circuit adopts the same reliance on injury rates on which the Sixth Circuit erroneously relied. The Fifth Circuit expressly cites *Nolichuckey* and relies on its reasoning as indicated by the following excerpts from its

opinion.

> "By contrast, the Mine Safety Act is aimed at a single industry with an acknowledged history of hazardous working conditions and serious accidents..."
>
> "Although the sand and gravel industry does not have the long history of regulation found in the coal mining industry, Congress clearly found that sand and gravel excavations could be almost as dangerous as underground coal mines and condequently in need of similar supervision. U.S. Code Cong. & Admin. News, p. 2851 (1966). Because Congress found that all miners are exposed to unusually severe health and safety hazards, all mining is now pervasively regulated, at least with respect to health and safety measures."

Again, in light of statistical facts presented in this brief the error of the Congress and the Fifth Circuit is clearly exposed. There are **not** severe health and safety hazards in the limestone quarrying or sand and gravel industries. Limestone quarries and sand and gravel excavations are **not** "almost as dangerous as underground coal mines and consequently in need of similar supervision." Therefore, it cannot be said that the limestone quarrying and sand and gravel industries are pervasively regulated.

The Fifth Circuit also errs when it makes the following statement in *Texoline*.

> "Moreover, the inspection provisions of the Mine Safety Act are more limited than those of OSHA. They mandate periodic inspections and place limitations on the purposes for which searches may be made. They also limit the situations in which no notice is required. Thus, the provisions are more narrowly drawn than the comparable OSHA provision and there is less likelihood of the abuses of unbridled discretion upon executive and

administrative officers' that the Court in *Barlow's* found objectionable."

A comparison of the inspection provisions of MSHA and OSHA as was made in Argument II, above, will immediately identify this reasoning by the Fifth Circuit as faulty. Contrary to the finding of the Fifth Circuit, OSHA is actually much more restrictive in terms of inspections than MSHA. MSHA speaks of "inspection or investigation" without limitation. OSHA limits inspections to reasonable times at specific locations. Yet, this Court in *Barlow's* held that in companies regulated by OSHA a warrant was required. With the much more expansive and limitless inspection provisions under MSHA a warrant should also be required. It is the warrant and the warrant only which will limit the unbridled discretion of the Secretary and his representatives.

Marshall v. Stoudt's Ferry Preparation Co., 602 F. 2d 589, cert. denied, 444 U.S. 1015, involved a coal processing operation and a process whereby sand and gravel was separated from the coal which was dredged from a river. Although there was no mining involved in *Stoudt's Ferry* there was processing and the Third Circuit held that "the work of preparing coal or other minerals is included within the Act whether or not extraction is also being performed by the operator." In order to make this inclusion one of pervasive regulation, the Third Circuit makes the same argument made by the Fifth Circuit in *Texoline* that the inspection provisions of MSHA are more limited and closely defined than those of OSHA. As shown above, this is not the case.

Next, the Third Circuit notes the long history of governmental regulation of coal mines beginning as early as 1865 and with the Bureau of Mines being established in 1910. Sand and gravel operations have no history of such regulations. The first such federal "regulation" began in 1966 with the Federal Metal and Non-Metallic Mine Safety Act. However, under the 1966 [illegible]al legislation the agency representatives did not issue citations. MESA under the 1966

Act had no authority to issue mandatory citations with accompanying penalties of up to $10,000 unlike MSHA. The inspections were advisory in nature. Also, there were no criminal penalties unlike MSHA which has criminal penalties of up to 5 years in prison for wilfull violation of that Act (Section 110(d), 30 U.S.C. §820(d)). That MSHA has criminal sanctions should in itself be enough for this Court to hold that a warrant is required. Warrants are required in most other criminal proceedings.

The glaring omission from the decision by the Third Circuit in *Stoudt's Ferry* is that although it noted the long history of regulation for coal mines as required by *Biswell* and *Colonnade* for pervasive regulation there is no such notation of the long history of regulation of limestone quarries or sand and gravel operations. Thus, limestone quarries and sand and gravel operations do not fit the *Biswell-Colonnade* exceptions to the search provisions of the Fourth Amendment.

What the Third Circuit erroneously attempted to do is to align sand and gravel operations to coal operations and create a history for pervasive regulation of sand and gravel through coal. The elasticity of the Court's reasoning cannot be stretched to cover this alignment without breaking. The comparison cannot properly be made. This Court now has the opportunity to avoid the same error made by the Third Circuit as well as the Fifth and Sixth Circuits.

Marshall v. Sink, 614 F. 2d 37, decided by the Fourth Circuit pushed the doctrine of pervasive regulation to ludicrous extremes. Charles Sink owns and operates a one man coal mine. Mr. Sink is the owner and the employee.

The Fourth Circuit recognized the doctrine that "warrantless searches of premises occupied by businesses that historically have been subject to pervasive governmental regulation" are valid. The Court in *Sink* then went along with the Third Circuit in *Stoudt's* and the Sixth Circuit in *Nolichuckey* in holding that:

> the congressional authorization of warrantless search was not unreasonble because of the strong governmental interest in unannounced inspection, the limitations on the searches by the statute, and the pervasive governmental regulation of the mining industry. *Stoudt's Ferry* and *Nolichuckey* distinguish *Barlow* on the grounds that inspections under the Coal Act only affect on industry, are limited by specific provisions in the Act, and serve an overriding governmental interest in the safety of miners.

Closer analysis of the above reasoning in the *Sink* case should show this Court that that reasoning does not hold up for three reasons. First, there may be a strong governmental interest in unannounced inspections of coal mines but this most certainly is not the case in limestone quarries or sand and gravel operations as shown by the statistical facts herein. Beyond this it stretches credulity that the government has an interest in regulating a one man coal mine where there are no affected employees. A one man coal mine is really most like a private residence which requires a warrant prior to search.

Second, as shown above, the argument that MSHA places limitations on searches is entirely invalid when OSHA and MSHA are compared. OSHA places more limitation on search than MSHA, yet this Court in *Barlow's* held warrantless inspections of companies regulated by OSHA to be unconstitutional.

Third, it cannot be said that limestone quarries and sand and gravel operations are pervasively regulated because the history of regulation required before pervasiveness can attach simply does not exist for limestone quarries and sand and gravel operations. The Court in *Sink* admits that Mr. Sink came under no regulation until 1969 but yet because of governmental interest he is pervasively regulated. The companies herein submit that in this regard, the Court in *Sink* has simply ignored the law, a most alarming result, a result which cries out for correction by this Court.

Where, as here, a right as fundamental as the Fourth Amendment is involved, the public interest (governmental interest) is better served by restraint from any action which would violate such right. As Mr. Justice Jackson said in his dissent in *Brinegar v. United States*, 338 U.S. 160, shortly after his return from the Nuremburg trials, "Fourth Amendment rights are not second class rights, but belong in the catalogue of indispensible freedoms." He continued, "Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government."

In the instant case, the threatened injury to Dewey and *Amicus* far outweighs the threatened harm to the government. In this case, the possible injury to the government is the inconvenience of a warrant—the harm to Dewey and *Amicus* is violation of their constitutional rights, the right to have the government's determination to inspect reviewed by an impartial tribunal to assure freedom from potential harassment, serious impairment and loss of business and capital.

The ability of the government to enter under proper circumstances is not questioned. What is in question is Dewey's and the *Amicus'* right to be free from search by a government agent exercised in the agent's sole discretion without the benefit of a warrant issued by an impartial tribunal based on **neutral** criteria. *See v. Seattle*, 387 U.S. 541 (1967), and *Marshall v. Barlow's, supra* make it clear that businessmen have such rights.

Those charged with enforcement of the laws and investigation and prosecutorial functions should not be the sole judges of when to use their constitutionally senstive means. *United States v. United States District Court, Eastern District of Michigan*, 407 U.S. 297 (1972). Our forefathers realized that unreviewed discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy. History is repleat with examples of abuses of search powers when not checked by warrant.

Some abuses by the well-meaning individuals, others not so well-meant. MSHA gives power to government agents to search but imposes no other restrictions on the government's discretion as to reasonableness. An investigator's duty may cause him to be overzealous in enforcement and overlook Dewey's and the *Amicus'* right to privacy to operate their businesses free from harassment. Dewey's and the *Amicus'* rights clearly outweigh the government's inconvenience.

In *Marshall v. Wait*, 628 F. 2d 1255 (9th Cir. 1980) the Ninth Circuit correctly invalidated the warrantless inspection provisions of the Mine Safety and Health Act thereby knocking down the unbridled descretion of government agents and preserving the freedoms of industries which are not pervasively regulated.

CONCLUSION

Amicus again stresses that limestone quarries and sand and gravel operations have never been so regulated that an exception to the general w rant requirement can be said to have been created as to these industries. Congress cannot declare limestone quarries and sand and gravel operations are pervasively regulated simply by including them under broad definition with underground coal mines. The MSHA regulatory scheme is unreasonble as it applies to limestone quarries and sand and gravel operations. Other than requiring a minimum of two inspections per year, there is no restraint upon the discretion of the governmental agent in the field. As conclusively shown, there is no necessity for warrantless inspections of limestone quarries and sand and gravel operations on the basis of their being inherently or unusually dangerous. As conclusively shown, limestone quarries and sand and gravel operations are no more dangerous than numerous occupations and industries covered by OSHA, where a warrant is required.

If the government prevails in this case, then Congress will be able to declare any aspect of American industry pervasively regulated at will. It will need only to address each particular industry with a broad definition of that industry, and a specific act regulating that industry. There can be no doubt that the federal bureaucracy if given such opportunities will certainly take them.

The protections of the Fourth Amendment will soon vanish from American industry. Congress tried to strip the Fourth Amendment protections from the entirety of American free enterprise with OSHA, but was unsuccessful in *Barlow's*. What Congress is now attempting to do is to reach the same result on a piecemeal basis, one industry at a time. If the Court permits Congress to strip the Fourth Amendment rights of limestone quarry operators and sand and gravel operators away via MSHA, then it will have cleared the way for this alternative route to a socialistic and government dominated state. This Court can stop and reverse this trend and can hold that an industry is not pervasively regulated merely because Congress says it is, or wants it to be, and that the exception to the general warrant requirement is truly and exception and only applies to industries which by history and license are truly pervasively regulated.

For all of the foregoing reasons, *Amicus* respectfully requests that this Court affirm the judgment of the United States District Court for the Eastern District of Wisconsin.

Respectfully submitted,

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ADDENDUM "A"

BLS Report No. 360, Injury Rates by Industry, 1966 and 1967

United States Department of Labor - Bureau of Labor Statistics

Library Call number L 2.71:360

INDUSTRY	Number of injuries per million employee hours worked	
	1966	1967
Meat products	36.2	38.1
Poultry dressing & packing	42.0	44.4
Canned & cured sea food	45.7	38.6
Knit fabric mills	21.6	17.4
Logging camps & contractors	48.4	58.3
Sawmills & planing mills	36.8	42.1
Wood household furniture	20.5	23.2
Metal partitions	29.1	27.2
Glue and gelatin	23.4	21.7
Leather tanning & finishing	37.0	38.2
Structual clay products	42.6	42.3
Concrete block & brick	36.4	34.8
Steel wire drawing	27.3	26.9
Iron & steel foundries	28.4	29.2
Fabricated structural steel	33.9	34.8
Games & toys	21.1	15.6
Bituminous coal	41.9	40.8
Anthracite	59.4	48.7
Sand & Gravel	19.1	18.7
Stone quarrying, Limestone	22.8	20.7
Construction	30.4	26.4
Heavy construction	32.3	27.5
Plumbing, heating & air conditioning	24.4	24.9
Roofing & Sheet metal work	42.2	44.1
Trucking	31.7	32.4
Groceries & related products	21.3	23.3
Refuse collection & disposal	70.0	52.4

ADDENDUM "B"

BLS Report No. 460, Chartbook on Occupational Injuries and Illnesses, 1974
U.S. Department of Labor - Bureau of Labor Statistics
Library call number L 2.71:460

INDUSTRY	Incidence rates per 100 full-time workers	
	1973	1974
Metal mining	8.0	7.5
Anthracite mining	26.3	22.3
Bituminous coal	18.8	10.6
Nonmetallic minerals	7.0	6.8
General building contractors	20.7	19.1
Heavy construction	21.1	19.9
Plumbing, heating & air conditioning	20.6	19.2
Roofing & Sheet Metal work	27.7	26.2
Logging camps & contractors	32.0	29.2
Sawmill & planing mills	24.9	22.7
Wood household furniture	18.9	16.8
Metal partitions	28.8	25.1
Concrete products	25.6	23.9
Blast furnaces & steel mills	15.0	13.4
Steel pipe & tubes	27.3	27.3
Steel foundries	25.5	26.2
Plumbing & heating	23.1	19.2
Sheet-metal work	29.2	24.6
Fabricated pipe & fittings	25.9	22.4
Truck trailers	33.6	33.6
Shipbuilding & Repairing	24.5	24.1
Meat products	27.2	28.2
Poultry dressing plants	25.7	24.2
Canned and cured sea food	20.9	21.1
Malt liquors	20.9	21.4
Leather tanning & finishing	21.6	20.6

ADDENDUM "C"

BLS Report No. 561, Occupational Injuries and Illnesses in 1977: Summary

U.S. Department of Labor - Bureau of Labor Statistics

Library call number L 2.71:561

INDUSTRY	Incidence rate per 100 full-time workers	
	1976	1977
Metal mining	5.9	7.4
Anthracite mining	27.1	21.6
Bituminous coal	13.2	12.3
Nonmetallic minerals	5.0	5.1
General building contractors	14.2	14.8
Heavy construction	16.9	15.6
Highway & street construction	14.3	14.8
Plumbing, heating & air conditioning	15.4	16.8
Roofing & sheet-metal work	21.1	20.9
Logging camps & contractors	24.6	25.8
Sawmills & planing mills	21.8	20.7
Millwork (wood)	22.0	22.0
Wood household furniture	15.1	15.4
Concrete products	20.5	23.6
Blast furnaces and steel mills	10.1	10.0
Steel pipe & tubes	23.1	21.4
Steel foundries	27.9	23.0
Plumbing & heating	18.1	19.6
Sheet-metal work	21.3	23.2
Fabricated pipe & fitting	21.4	20.4
Truck trailers	28.7	27.2
Shipbuilding & repairing	22.1	20.2
Games & toys	13.4	12.4
Meat products	26.4	26.8
Meat packing plants	32.4	31.5
Poultry dressing plants	20.0	20.4
Canned & cured seafoods	16.5	18.9
Knitting mills	13.4	12.6
Leather tanning & finishing	21.7	21.8

ADDENDUM "D"

Accident Facts 1976 Edition, National Safety Council
Library call number
HB
1323
A2A25
1976

Accidental deaths and injuries in 1975, p. 3

	Deaths	Disabling Injuries
Motor-Vehicle	46,000	1,800,000
Work	12,600	2,200,000
Home	25,500	4,000,000
Public	22,500	2,800,000

Accidents vs. other causes of death, 1974, p. 9

	All Ages
All Causes	1,934,389
Heart disease	738,171
Cancer	360,472
Stroke	207,424
Accidents	104,622
Motor-vehicle	46,402
Falls	16,339
Drowning	7,876
Fires, burns	6,236
Poison	4,016
Pneumonia	52,576
Diabetes mellitus	37,329
Cirrhosis of liver	33,319
Arteriosclerosis	32,239
Suicide	25,683
Homicide	21,465
Emphysema	19,907

Largest U.S. Disasters by Category, p. 21

	Type and Location	No. of Deaths	Date of Disaster
Floods:	Galveston tidal wave	6,000	Sept. 8, 1900
	Johnstown, Pa.	2,209	May 31, 1889
	Ohio and Indiana	732	Mar. 28, 1913
	St. Francis, Calif, dam burst	450	Mar. 13, 1928
	Ohio and Mississippi River valleys	380	Jan. 22, 1937
Hurricanes:	Florida	1,833	Sept. 16-17, 1928
	New England	657	Sept. 21, 1938
	Louisiana	500	Sept. 29, 1915
	Florida	409	Sept. 1-2, 1935
	Louisiana and Texas	395	June 27-28, 1957
Tornadoes:	Illinois	606	Mar. 18, 1925
	Mississippi, Alabama, Georgia	402	Apr. 2-7, 1936
	Southern and Midwestern states	318	Apr. 3, 1974
	Ind., Ohio, Mich., Ill. and Wisc.	272	Apr. 11, 1965
	Ark., Tenn., Mo., Miss. and Ala.	229	Mar. 21-22, 1952
Earth-quakes:	San Francisco earthquake and fire	452	Apr. 18, 1906
	Alaskan earthquake-tsunami hit Hawaii, Calif.	173	Apr. 1, 1946
	Long Beach, Calif. earthquake	120	Mar. 10, 1933
	Alaskan earthquake and tsunami	117	Mar. 27, 1964
	San Fernando-Los Angeles, Calif. earthquake	65	Feb. 9, 1971
Marine:	"Sultana" exploded-Mississippi Rv.	1,547	Apr. 27, 1865
	"Titanic" struck iceberg-Atlantic Ocean	1,517	Apr. 15, 1912
	"Empress of Ireland" ship collision-St. Lawrence River	1,024	May 29, 1914
	"General Slocum" burned-East River	1,021	June 15, 1904
	"Eastland" capsized-Chicago River	812	July 24, 1915
Aircraft:	Two-plane collision over New York City	134	Dec. 16, 1960
	Two-plane collision over Grand Canyon, Ariz.	128	June 30, 1956
	Scheduled jetliner crash in New York City	113	June 24, 1975
	Jetliner crash into mountainside near Juneau, Alaska	111	Sept. 4, 1971
	Scheduled plane crash near Miami, Fla.	101	Dec. 29, 1972
Railroad:	Two-train collision near Nashville, Tenn.	101	July 9, 1918
	Two-train collision, Eden, Colo.	96	Aug. 7, 1904
	Avalanche hit two trains near Wellington, Wash.	96	Mar. 1, 1910
	Bridge collapse under train, Ashtabula, Ohio	92	Dec. 29, 1876
	Rapid transit train derailment, Brooklyn, N.Y.	92	Nov. 1, 1918
Fires:	Peshtigo, Wisc. and surrounding area forest fire	1,152	Oct. 9, 1871
	Iroguois Theatre, Chicago	575	Dec. 30, 1903

	Cocoanut Grove nightclub, Boston ...	492	Nov. 28, 1942
	North German Lloyd Steamships, Hoboken, N.J.	326	June 30, 1900
	Ohio penitentiary, Columbus	320	Apr. 21, 1930
Explosions:	Texas City, Texas ship explosion	561	Apr. 16, 1947
	Port Chicago, Calif. ship explosion...	322	July 18, 1944
	New London, Texas school explosion	294	Mar. 18, 1937
	Eddystone, Pa. munitions plant explosion	133	Apr. 10, 1917
	Cleveland, Ohio gas tank explosion ..	130	Oct. 20, 1944
Mines:	Monongha, West Va. coal mine explosion	361	Dec. 6, 1907
	Dawson, New Mexico coal mine fire .	263	Oct. 22, 1913
	Cherry, Ill. coal mine fire	259	Nov. 13, 1909
	Jacobs Creek, Pa. coal mine explosion	239	Dec. 19, 1907
	Scofield, Utah coal mine explosion ...	200	May 1, 1900